Supreme Court, U. S.
FILED
AUG 15 1978
K, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-254

STATE OF OHIO,

Petitioner,

vs.

JAMES U. RUPPERT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

JOHN F. HOLCOMB

PROSECUTING ATTORNEY
BUTLER COUNTY, OHIO

310 Rentschler Building
Hamilton, Ohio 45011
Telephone (513) 867-5722

DANIEL G. EICHEL

ASSISTANT PROSECUTING ATTORNEY

ATTORNEYS FOR PETITIONER

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

	Page
OPINIONS BELOW	1
JURISDICTION	2
QUESTIONS PRESENTED	2
CONSTITUTIONAL PROVISIONS	3
STATEMENT	3
A. Facts	3
B. Motion for a New Trial	4
C. Proceedings on Appeal	7
D. Proceedings in Supreme Court of Ohio	8
REASONS FOR GRANTING THE WRIT	10
I. This court should determine whether due process requires a waiver of jury trial and conviction by a state three-judge court to be set aside, solely because defense counsel advised the accused that state law required a unanimous finding of the three-judge panel to convict, but upon a conviction by a majority, such advice proved to be incorrect when clarified and finally resolved by the state's highest court on review.	10
II. Due process of law is not denied where a judge's statement of opinion of law, in agreement with defense counsel's position, arose at the suggestion of defense counsel and thus constitutes invited error, cumulative of the competent advice of counsel.	18
CONCLUSION	20

	Page
APPENDIX A	
Opinion of the Supreme Court of Ohio	1a
APPENDIX B	
Opinion of the Court of Appeals, Butler Co., First Appellate District of Ohio	12a
APPENDIX C	
Rulings of the Court of Common Pleas, Butler Co., Ohio	32a
APPENDIX D	
Judgment Entry of the Supreme Court of Ohio	38a
APPENDIX E	
Statutes Involved	
Ohio. Rev. Code Ann. §2929.03 (Page 1975)	40a
Committee Comment	42a
Ohio Rev. Code Ann. § 2945.06 (Page 1975)	43a
APPENDIX F	
Affidavits Submitted on Motion for New Trial	45a
1) Fred B. Cramer, July 18, 1975	47a
2) Fred B. Cramer, July 22, 1975	54a
3) James U. Ruppert	56a
4) Hugh D. Holbrock	57a
5) H. J. Bressler	59a
6) John F. Holcomb	60a

AUTHORITIES

Cases:	Page
Adams v. *United States ex rel. McCann*, 317 U.S. 269 (1943)	11, 12
Brady v. *United States*, 397 U.S. 742 (1970)	12
Henderson v. *Morgan*, 426 U.S. 637 (1976)	15, 16
Jeffers v. *United States*, 432 U.S. 137 (1977)	19
McMann v. *Richardson*, 397 U.S. 759 (1970)	12, 13, 16, 17
Parker v. *North Carolina*, 397 U.S. 790 (1970)	12, 13, 14
Tollett v. *Henderson*, 411 U.S. 258 (1973)	14, 15
United States v. *Jackson*, 390 U.S. 570 (1968)	12, 13

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. ———

STATE OF OHIO,

Petitioner,

vs.

JAMES U. RUPPERT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

Petitioner, the State of Ohio, by John F. Holcomb, Prosecuting Attorney for Butler County, Ohio, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Ohio entered in this cause on May 17, 1978.

OPINIONS BELOW

The decision of the Supreme Court of Ohio was filed on May 17, 1978, and is reported at 54 Ohio St. 2d 263, 375 N.E. 2d 1250 (1978), appended hereto as Appendix A. Unreported decisions of the Court of Appeals for Butler County, Ohio and the Court of Common Pleas, Butler County, Ohio, are appended hereto as Appendix B and C,

respectively. The judgment entry of the Supreme Court of Ohio is appended hereto as Appendix D.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on May 17, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3), and this petition is filed within ninety (90) days after the entry of judgment in the Supreme Court of Ohio.

QUESTIONS PRESENTED

I. Whether a waiver of jury trial was knowing, intelligent and voluntary on the part of a defendant who was fully advised by counsel as to his right to trial by jury and was advised to waive that right and to elect to be tried on a capital offense by a three-judge panel, with the further advice that state law would require a decision of the panel on his guilt to be unanimous, when such question of panel trial procedure under recently revised state capital punishment statutes was not settled and highly debatable, and such advice of counsel was reasonably competent, although subsequently determined on appeal in state reviewing courts to be incorrect.

II. Whether a claim of denial of due process of law may stand where the accused's counsel, advocating a proposition of law, seeks and obtains the trial judge's agreement without notice or presence of counsel for the state, and after conviction claims error based on such invited ruling, cumulative of counsel's own advice.

CONSTITUTIONAL PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES, AMENDMENT V:

> "No person shall . . . be deprived of life, liberty or property, without due process of law."

CONSTITUTION OF THE UNITED STATES, AMENDMENT VI:

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ."

CONSTITUTION OF THE UNITED STATES: AMENDMENT XIV:

> ". . . Nor shall any State deprive any person of Life, Liberty or property, without due process of Law. . . ."

STATEMENT OF THE CASE

A. Facts

On March 30, 1975, Respondent James U. Ruppert shot and killed each of the eleven members of his immediate family as they were gathered at his mother's Hamilton, Ohio home for Easter Sunday. Dead were his mother, Charity Ruppert; his brother Leonard, Jr.; his brother's wife, Alma; and his brother's eight children, ranging in age from seventeen to four. Respondent was arrested, indicted and convicted on eleven counts of aggravated murder, in violation of Ohio Revised Code § 2903.01 (A), with the specification to each count that the offense was part of a course of conduct involving the purposeful killing of two or more persons, contrary to Ohio Revised Code

§ 2929.04 (A) (5), a capital offense as then in effect. At the time of the offense and trial, Ohio statutes provided a choice of procedures in aggravated murder-capital offense cases, permitting the accused to choose between a jury trial, with imposition of sentence by one judge, or trial by a three-judge panel, with imposition of sentence to be by the same three-judge court.

Respondent Ruppert pled not guilty and not guilty by reason of insanity, waived a jury and was tried before a three-judge panel pursuant to § 2945.06 of the Ohio Revised Code. Trial commenced on June 16, 1975, and on July 3, 1975, a majority of the court found defendant guilty of each of the eleven counts as charged, and found further that defendant was sane at the time he committed the offense. Unable to unanimously find that none of the mitigating circumstances provided in Ohio Revised Code § 2929.04 (B) was established, the trial court on July 14, 1975 sentenced Respondent to life imprisonment for each of the eleven counts, consecutively.

B. Motion for New Trial

Subsequently, Respondent Ruppert filed a motion for new trial contending that his waiver of jury trial was not knowingly, intelligently and voluntarily made because his attorneys had advised that a verdict of the three-judge court must be rendered unanimously. In the alternative, Respondent asserted that his conviction by a majority of the panel was improper, contending that a unanimous verdict would be required to find him guilty as charged. On July 22, 1975, the motion for new trial was heard upon the submitted affidavits of Judge Fred B. Cramer, Respondent James U. Ruppert, defense attorneys Hugh D. Holbrock and H. J. Bressler, and prosecuting attorney John

F. Holcomb, (Appendix F), and the testimony of Respondent Ruppert and defense attorney Holbrock.

The affidavits and testimony, together with the record in this case, established that defense counsel had discussed the matter of waiving a jury and choosing to be tried by a three-judge panel with Respondent in frequent interviews over a period of a week or more. After such counseling and days prior to the execution of the jury waiver on June 6, 1975, defense counsel "firmly advised" Judge Cramer that Respondent was "definitely waiving a trial by jury and consenting to be tried by a three-judge panel." (Affidavit of Fred B. Cramer, July 22, 1975.) After being so informed, Judge Cramer and Respondent's attorneys had an informal discussion in chambers, at which the prosecuting attorney was not present, and discussed the issue of verdicts of a three-judge court.

Section 2945.06, Ohio Revised Code, provides in pertinent part, "Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly." Respondent's attorneys stated to Judge Cramer that they had examined the law and had advised Respondent that the panel's verdict must be unanimous, based on counsel's reading of Section 2929.03, Ohio Revised Code, and most specifically the committee comment following that section, which reads that the procedure under Ohio's newly enacted capital punishment statute "is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of jury. The burden of proof still rests on the State, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt and the panel's verdict must be unanimous." On examination of the stat-

utes so presented, Judge Cramer informed defense counsel that he was in agreement with the advice they had given Respondent, that the panel's verdict must be unanimous.

Thereafter, in open court on June 6, 1975, Respondent executed a written waiver of jury trial and was examined by Judge Cramer, who again advised Respondent that in reaching a verdict, all three of the panel must agree.

On the morning of commencement of trial, June 16, 1975, a pretrial conference of the three trial judges, two defense counsel and the prosecuting attorney took place in chambers. One of the defense attorneys, Hugh D. Holbrock, made inquiry of the judges as to whether the panel had determined as to whether the law required the decision respecting guilt, innocence or not guilty by reason of insanity to be arrived at unanimously. Judge Cramer's affidavit of July 22, 1975 states:

> "counsel was then informed that such decision would be made at the time consideration was being given to the cause after its completion and the court was going into deliberation."

(Affidavits, Appendix F.) Immediately thereafter, the court was opened and Respondent, accompanied by counsel, appeared before the three-judge panel and reaffirmed his jury waiver.

Testimony at the hearing by Respondent Ruppert and one defense attorney Mr. Holbrock, urged that Respondent waived a jury trial solely on the understanding that a verdict of the panel must be unanimous, and contrary to Judge Cramer's affidavits, urged that the decision to waive a jury was not made until the June 6 date of its written execution.

Upon the evidence, the majority of the trial court overruled Respondent's motion for new trial, finding his jury waiver to be a voluntary and intelligent waiver of his known right to a jury trial, made upon the competent advice of counsel to waive a jury for many significant reasons, and not solely on advice that a panel verdict must be unanimous. (Appendix C.) Judge Cramer, dissenting, stated his opinion that the majority verdict was contrary to law, reasoning that Revised Code § 2945.06 providing for a majority finding was repealed by implication in the wake of the 1974 Criminal Code revision and enactment of new capital punishment procedure requiring unanimity of a three-judge court in the imposition of a death sentence. Judge Cramer, thus being of the opinion that the advice of counsel was correct, found the jury waiver to be valid. (Appendix C.)

C. Proceedings on Appeal

Respondent appealed his conviction to the Court of Appeals for Butler County, First Appellate District of Ohio. which reversed the conviction by a decision filed August 3, 1977. (Appendix B.)

Among his eight assignments of error, Respondent first urged reversal of the conviction by majority verdict, contending that the statutory provision for majority findings by a three-judge court under Revised Code § 2945.06 had been repealed by implication with the enactment of the 1974 Ohio Criminal Code; he further urged that a provision for majority decision would violate equal protection of law. The Court of Appeals did not agree with either argument, and construed the legislative enactments to leave Revised Code § 2945.06 in full force and effect, thus expressing an intent that a three-judge panel court shall act

by majority vote in the first (guilt) stage of a capital trial. Legislative Committee comments following Revised Code § 2929.03, stating a view to the contrary, (Appendix E), were ruled non-persuasive. Respondent's equal protection argument was likewise rejected on the authority of an earlier Ohio case, *State* v. *Robbins,* 176 Ohio St. 362, 199 N.E. 2d 742 (1964), which had upheld a majority verdict of a three-judge court in a non-capital case, prior to the 1974 Criminal Code revision.

Respondent's second assignment of error, which the Court of Appeals sustained, was that his jury waiver was not knowing, intelligent and voluntary since he had been informed by counsel and Judge Cramer that the panel's verdict must be unanimous. The Court of Appeals reviewed the issue of majority-vs-unanimous decision validity in the guilt phase of trial and stated:

> "The issue is one of first impression. Experienced person [*sic*] in all branches of the legal profession could reasonably come to opposite conclusions."

(Appendix B, page 7 of Decision.) Notwithstanding this recognition of the reasonableness of counsels' advice, however, the Court of Appeals reversed Respondent's conviction on this ground, citing *Henderson* v. *Morgan,* 426 U.S. 637 (1976).

D. Proceedings in Supreme Court of Ohio

Petitioner's motion for leave to appeal the Court of Appeals' decision was granted by the Supreme Court of Ohio, which affirmed the judgment of the Court of Appeals by decision dated May 17, 1978. (Appendix A, D.) Respondent cross-appealed to challenge the validity of a majority verdict in the three-judge court.

The Supreme Court ruled that a majority of the three-judge panel may render a guilty verdict in the first phase of the aggravated murder trial, upholding § 2945.06, and finding no direct conflict between that provision and newly-enacted provisions of the 1974 Ohio Criminal Code requiring unanimity of the panel in imposing the death sentence, § 2929.03 (E). The Court on this issue followed its prior decision in *State* v. *Robbins,* 176 Ohio St. 362, 199 N.E. 2d 742 (1964), finding no denial of due process or equal protection by allowance of majority court verdicts.

Thus, having clarified and resolved the debated question of panel verdicts, the Supreme Court affirmed the Court of Appeals on the issue of Respondent's jury waiver, stating simply that Respondent was "misinformed" as to a consequence of his jury waiver, irrespective of other important tactical considerations entering into his decision. The Supreme Court made no reference as to whether the reasonableness and competence of counsel's advice at the time of the waiver was material.

REASONS WHY CERTIORARI SHOULD BE GRANTED

I.

This court should determine whether due process requires a waiver of jury trial and conviction by a state three-judge court to be set aside, solely because defense counsel advised the accused that state law required a unanimous finding of the three-judge panel to convict, but upon a conviction by a majority, such advice proved to be incorrect when clarified and finally resolved by the state's highest court on review.

Without consideration of any other factor, the Supreme Court of Ohio held the jury waiver of James U. Ruppert invalid solely on the ground that defense counsel and the presiding judge told Ruppert that the three-judge panel must be unanimous on the issues of guilt and insanity. By its decision, the state's highest court first clarifies and resolves the issue on which competent advice was given, resolving that issue adversely to Respondent's contention; then, without acknowledgment of the eminent reasonableness and competence of advice on that issue, the court declares that such "misinformation" rendered the jury waiver void. Thus, the decision adopts a *per se* rule to invalidate a jury waiver made by a man who unquestionably understood the constitutional right he was waiving and was advised by competent defense counsel, solely because his counsel's advice regarding trial procedure with a three-judge panel, with which the presiding judge expressed agreement, proved to be an incorrect prediction of a legal issue which was still to be resolved on appeal of the case. This rule would cut much too broadly by causing waivers of constitutional rights to be declared void wherever counsel gives

reasonable competent advice on an unsettled question but such advice is retrospectively found to be incorrect. Such a rule is inconsistent with the direction taken by the United States Supreme Court's decisions.

The threshold decision on waiver of jury trial is *Adams* v. *United States ex rel. McCann,* 317 U.S. 269 (1943), in which the defendant had insisted on conducting his case without the assistance of a lawyer, and tendered a written jury waiver to the court; the waiver was accepted after a colloquy by the judge. In upholding the jury waiver, the Court stated:

> The short of the matter is that an accused in the exercise of a free and intelligent choice, and with the considered approval of the court, may waive trial by jury. . . . There is nothing in the Constitution to prevent an accused from choosing to have his fate decided by a judge without a jury, even though in deciding what is best for himself, he follows the guidance of his own wisdom and not that of a lawyer.
>
> *Id.* at 275.

Adams also discusses the manner in which a "free and intelligent" waiver is deduced:

> And whether or not there is an intelligent, competent self-protecting waiver of jury trial by an accused must depend upon the unique circumstances of each case. . . . And since trial by jury confers burdens as well as benefits, an accused should be permitted to forego its privileges when his competent judgment counsels him that his interests are safer in the keeping of the judge than of the jury.
>
> * * *
>
> . . . To deny an accused a choice of procedure in circumstances in which he, though a layman, is as capable as any lawyer of making an intelligent choice, is

> to impair the worth of great constitutional safeguards by treating them as empty verbalisms.
>
> *Id.* at 278, 280.

Significantly, the very point upon which Ruppert asserts the invalidity of his waiver – advice of Judge Cramer, Mr. Holbrock and Mr. Bressler that the court's verdict must be unanimous – was not challenged as incompetent advice and, indeed, was maintained by defendant to be a correct view of the law, in his arguments to the State appellate courts. (*See,* Decisions, Appendix A & B). Thus, in light of *Adams,* the question raised in this case is whether Ruppert as a layman could make an intelligent waiver of a jury trial when his understanding of the law is *equal* to that of his two retained, competent defense attorneys and one judge of the Common Pleas Court.

In a trilogy of cases decided in 1970, the Supreme Court developed the principles established in the *Adams* decision to meet the modern reality of universal assistance of counsel. These three cases are *Brady* v. *United States,* 397 U.S. 742 (1970), *McMann* v. *Richardson,* 397 U.S. 759 (1970), and *Parker* v. *North Carolina,* 397 U.S. 790 (1970).

In *Brady,* the defendant contended that his jury waiver and guilty plea to a federal kidnapping charge were invalid because they were entered upon the advice of counsel to avoid the possibility of a death penalty. The plea was entered prior to the court's decision in *United States* v. *Jackson,* 390 U.S. 570 (1968), which held the death penalty provision of the Federal Kidnapping Act unconstitutional because it permitted imposition of the death sentence only upon a jury's recommendation, and never on a judge's finding, and thereby imposed an impermissible burden upon the exercise of the right to a jury trial. The *Brady* court nevertheless found that the defendant's guilty plea was

intelligent and voluntary even though his counsel had failed to anticipate the *Jackson* decision, stating:

> *Considerations like these frequently present imponderable questions for which there are no certain answers; judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time.* The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision. 397 U.S. 757 (Emphasis added).

In *Parker* v. *North Carolina,* the defendant entered a guilty plea to first degree burglary and thereby precluded a death sentence under North Carolina law; upon a not guilty plea and trial by court or jury, the death penalty was possible. This death penalty statute, like the Federal Kidnapping Act, would be unconstitutional under the rationale of *United States* v. *Jackson;* moreover, Parker's guilty plea was entered two years *after* the *Jackson* decision. Defendant further claimed his plea to be unintelligently made because his counsel mistakenly thought his confession to the police was admissible. Nevertheless, the Court upheld the plea, finding the defendant's retained attorney's advice to be "well within the range of competence required of attorneys representing defendants in criminal cases," 397 U.S. at 798, even though counsel did not correctly advise as to the effect of *Jackson* on the North Carolina statute.

In *McMann* v. *Richardson,* it was alleged that counsel had erred in the assessment of the admissibility of defendant's confession. In finding the plea to be voluntary and intelligent, the Supreme Court discussed the role of counsel at length:

> [T]he decision to plead guilty before the evidence is in frequently involves the making of difficult judgment. . . . In the face of unavoidable uncertainty, the defendant and his counsel must make their best judgment as to the weight of the State's case. . . . Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or as to what court's judgment might be on given facts.
>
> *That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant's lawyer withstand retrospective examination in a post-conviction hearing.* Courts continue to have serious differences among themselves on the admissibility of evidence, both are to be judged and with respect to the application of that standard to particular facts. . . .
>
> . . . . Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retrospectively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases. On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel. Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts. . . . 397 U.S. at 769-771.

Several years later, in *Tollett* v. *Henderson,* 411 U.S. 258 (1973), the Supreme Court followed the *Brady* trilogy in further establishing that erroneous advice which is "peripherial . . . to the normal focus of counsel's inquiry," *id.* at 267, will not invalidate a waiver of trial and guilty plea made intelligently and voluntarily with the otherwise competent advice of counsel.

> The principal value of counsel to the accused in a criminal prosecution often does not lie in counsel's ability to recite a list of possible offenses in the abstract, nor in his ability, if time permitted, to amass a large quantum of factual data and inform the defendant of it. Counsel's concern is the faithful representation of the interest of his client, and such representation frequently involves highly practical considerations as well as specialized knowledge of law.
> *Id.* at 267.

Thus, to summarize the Supreme Court decisions, the determination of due process in the waiver of a constitutional right is primarily concerned with the practicalities under all the relevant circumstances surrounding the waiver, rather than scholastic precision in any given detail.

Henderson v. *Morgan,* 426 U.S. 637 (1976), cited by the Ohio courts in this case, is not a departure from the above authority, but is consistent with the *Brady* trilogy. The Court's opinion and the concurring opinion by Mr. Justice White clearly show that defendant Morgan's guilty plea to second-degree murder was held involuntary because he was not informed that intent to cause his victim's death was an element of the offense; in other words, Morgan did not know what he was saying, and his guilty plea was of no substance as to admission. The Court made it clear, in footnote 18 of its opinion, that its holding was limited:

> There is no need in this case to decide whether notice of the true nature, or substance, of a charge always requires a description of every element of the offense; we assume it does not. Nevertheless, intent is such a critical element of the offense of second degree murder that notice of that element is required. *Id.* at 647.

We submit that Ruppert's case is one contemplated by footnote 18 in *Morgan;* no issue is raised, by pleading or by

evidence, that Ruppert did not fully understand the right he was waiving, and the record affirmatively shows his voluntary and intelligent waiver of the right to jury trial. A constitutionally valid waiver need not be omniscient of every facet of the law which may or may not arise and become debatable in the course of the proceedings, as *Henderson* v. *Morgan* illustrates; a waiver need be only intelligent as to its critical elements.

Henderson v. *Morgan* further establishes the appellate court's duty to accept the trial court's justified determination of fact on this issue. Speaking of the finding that notice of a crucial element of the offense of second-degree murder was lacking, the Court said:

> This case is unique because, the trial judge found as a fact that the element of intent was not explained to respondent.
>
> 426 U.S. at 647.

One can only conclude from *Henderson* that the Court assumed it was dealing with a constitutional failure that could be easily and objectively determined and prevented. This is certainly not true of the situation in this case, where, at the time of the counseled waiver, defense counsel makes his best, most competent prediction of an issue of law yet to be raised, litigated and resolved. The determinative issue in such cases is whether the advice of counsel was within the range of competence demanded of criminal attorneys, and is a question of fact to be determined by the trier of fact. As the Supreme Court stated in *McMann* v. *Richardson*,

> We think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel. . . .
>
> 397 U.S. at 771.

In this case, such determination was made by the trial court and was supported by the evidence; the reasonableness and competence was further advanced by Respondent's own attorneys in both appellate courts. The Court of Appeals and Supreme Court of Ohio, however, did not apply the test of *McMann, Brady, Tollett* and *Parker,* and consequently failed to consider the trial court's finding of fact.

The courts below have thus departed drastically from principles announced in this Court, by holding, in effect, that legal advice given by counsel and court at the time of a jury waiver must be absolutely accurate, for if the issue is later raised on appeal and the advice found to be erroneous, the jury waiver may be voided, irrespective of the competence of the advice. Such a *per se* rule demands a degree of perfection at the moment of a jury waiver decision which is inconsistent with the inherent uncertainty in predicting the outcome of legal proceedings. To fail to recognize that inherent uncertainty, as the courts below did, elevates form over substance and deprives the basic legal concept of waiver of all meaning.

In light of the lower court's failure to apply the established standards to determine whether a jury waiver is knowing, intelligent and voluntary, contrary to clear authority from this Court, the instant case presents this Court with an opportunity to clarify the relative significance of an accused's understanding of the advice of counsel as to the law in assessing the validity of any waiver. This case, therefore, warrants consideration by this Court.

II.

Due process of law is not denied where a judge's statement of opinion of law, in agreement with defense counsel's position, arose at the suggestion of defense counsel and thus constitutes invited error, cumulative of the competent advice of counsel.

The courts below assessing only the correctness of the advice Respondent was given by counsel and the presiding judge on three-judge court procedure, not only failed to consider the fact that such advice was a reasonably competent interpretation of law at the time of the waiver, albeit not the prevailing interpretation of law on appeal; the courts below further failed to consider the manner in which the comments by the judge arose.

It is without dispute that an informal pretrial discussion took place between counsel and the defendant and Judge Cramer, of which the posecuting attorney had no notice or knowledge. (Appendix F, Affidavit of Judge Fred B. Cramer; Affidavit of John F. Holcomb). At this meeting, after advising Judge Cramer that Ruppert was waiving a trial by jury, defense counsel stated that, upon examining the law, in particular the committee comments to R.C. Section 2929.03, counsel had informed Ruppert that a panel's verdict of guilty or not guilty must be unanimous. Judge Cramer then informed counsel that he was in agreement with this advice. (First Affidavit of Judge Fred B. Cramer). Thereafter, without the consultation of the prosecuting attorney or associate judges, Judge Cramer reiterated his opinion in accepting Ruppert's waiver on June 6, 1975.

The basis for Respondent's claim of denial of due process of law is, therefore, tantamount to invited error, for which his counsel is responsible; comments by the judge

were cumulative of counsel's own competent advice, and absent an allegation of ineffective counsel, the claimed denial of due process should not stand.

In quite the same posture was the case in *Jeffers* v. *United States,* 432 U.S. 137 (1977), where the defense successfully procured a ruling granting separate trials on two indictments, one charging conspiracy and the other charging a continuing criminal enterprise "in concert" with five or more persons, based on the same criminal activity. The Court reasoned that the accused thereby waived any right he may have under the Double Jeopardy Clause to be protected from multiple prosecution for a lesser included offense and the greater offense. Thus, it is clear that a claim of error of constitutional significance may be invited, by action taken or ruling made by the Court in accordance with his own suggestion or request; and a defendant should not be permitted to induce or mislead a court into error, and then procure reversal of the judgment based on error for which he was responsible.

The judgment of the court below, holding that Respondent was "misinformed" and did not knowingly, intelligently and voluntarily waive a jury trial, fails to recognize both that the "misinformation" arose at defense counsel's invitation and was a point of debated contention through all appellate proceedings until its final resolution. To void the waiver and the judgment of conviction as the courts below have done, undercuts the adversarial assumption on which our system of criminal justice rests, and impairs to a substantial degree the State's interest in enforcing its criminal laws. This Court should allow review of this case.

CONCLUSION

For the reasons stated, it is respectfully requested that a writ of certiorari should be granted to review the judgment of the Supreme Court of Ohio.

Respectfully submitted,

JOHN F. HOLCOMB
Prosecuting Attorney
Butler County, Ohio

DANIEL G. EICHEL
Assistant Prosecuting Attorney
Butler County, Ohio

Attorneys for Petitioner
310 Rentschler Building
Hamilton, Ohio 45011
Telephone: (513) 867-5722

APPENDIX A

Opinion of the Supreme Court of Ohio, 54 Ohio St. 2d 263, 375 N.E. 2d 1250 (1978), Entered May 17, 1978.

THE STATE OF OHIO, APPELLANT AND CROSS-APPELLEE, *v.* RUPPERT, APPELLEE AND CROSS-APPELLANT.

[Cite as State v. Ruppert (1978), 54 Ohio St. 2d 263.]

Criminal law—Capital offense—Waiver of jury trial—Not properly made, when—Three-judge panel—Majority may render verdict.

1. Where an accused, charged with a capital offense, knowingly, intelligently, and voluntarily waives his right to a trial by jury pursuant to R. C. 2945.05 and Crim. R. 23 (A), and is subsequently tried before a three-judge panel, the panel may render a verdict upon a majority vote of its members pursuant to R. C. 2945.06.
2. An accused, charged with a capital offense, has not knowingly, intelligently, and voluntarily waived his right to a trial by jury where, prior to waiving this right, he is misinformed that the three-judge panel may render a verdict pursuant to R. C. 2945.06 only by unanimous vote.

(No. 77-1022—Decided May 17, 1978.)

APPEAL from the Court of Appeals for Butler County.

James U. Ruppert, (defendant herein), was indicted by the Butler County grand jury on March 30, 1976, in 11

counts for purposely, and with prior calculation and design, causing the deaths of Charity Ruppert, Teresa Lee Ruppert, Carol Diane Ruppert, Michael James Ruppert, David Scott Ruppert, John Anthony Ruppert, Alma Ruppert, Ann Delores Ruppert, Leonard Ruppert, Jr., Leonard Ruppert, III, and Thomas Frank Ruppert, in violation of R. C. 2903.01 (A), with the specification to each count that the offense was part of a course of conduct involving the purposeful killing of two or more persons contrary to R. C. 2929.04 (A) (5).

Defendant entered a plea of not guilty and not guilty by reason of insanity to each of the counts and specifications. On May 13, 1975, the trial court determined that defendant was sane and of sufficient soundness of mind to stand trial.

Accompanied by his co-counsel, Hugh Holbrock and H. J. Bressler, defendant waived his right to a jury trial in open court on June 6, 1975.

Trial commenced before a three-judge panel on June 16, 1975, and on July 3, 1975, a majority of the court found defendant guilty of each of the 11 counts of aggravated murder and specifications. The majority found further that defendant was sane at the time he committed the offense.

Unable to unanimously find that none of the mitigating circumstances set forth in R. C. 2929.04 (B) was established by a preponderance of the evidence at the mitigation hearing, the court sentenced defendant to life imprisonment for each of the 11 counts, the sentences to run consecutively.

Defendant subsequently filed a motion for new trial, later amended, in which he contended, in part, that because he was misinformed about the number of judges necessary to render a verdict on a three-judge panel, his waiver of a

jury trial was not knowingly, intelligently, or voluntarily made. In the alternative, defendant contended that he was denied a fair trial since the verdict was reached by a majority vote of the panel rather than by a unanimous vote.

On July 22, 1975, the three-judge panel conducted a hearing on defendant's motion for new trial based on the testimony and affidavits of James U. Ruppert and defense attorney Hugh D. Holbrock, and on the submitted affidavits of Judge Cramer (the judge who originally accepted appellee's jury waiver and who also sat on the three-judge panel which tried the cause), prosecutor John F. Holcomb, and defense attorney H. J. Bressler. The testimony and affidavits reflect that prior to the date of the trial, defense counsel informed their client that if his case were tried to a three-judge panel, a unanimous verdict would be required to find him guilty as charged.

Also, prior to trial, Judge Cramer indicated to the defense counsel that he agreed with this interpretation of the law.

When, on June 6, 1975, Ruppert appeared in open court before Judge Cramer to waive his right to trial by jury, the following colloquy took place between Ruppert and the judge:

"Q. [J. Cramer] Now, you understand that when you are tried by a jury which you are waiving, before you can be found guilty or not guilty of any one or all of the 11 counts, all 12 of the jurors must agree?

"A. [Ruppert] Yes, sir.

"Q. But where three judges hear the case as you have consented and asked to be done, just all three have to agree?

"A. Yes, sir.

"Q. You understand that?

"A. Yes, sir.

"Q. You also understand, do you, that if you have a jury that before they can find in accordance with your de-

fense that you were sane or insane at the time of the alleged commission of said offenses, all 12 of the jurors must agree. However, if three judges hear your case as you have requested to be done before the three judges can find that you were sane or insane at the time of the alleged commission of the offenses, all three must agree on that?

"A. Yes, sir.

"Q. I'm pointing this out to you, the difference between when the jury hears a case and three judges.

"A. Yes, sir.

"Q. And you wish to without any question, to waive your trial by jury is that right?

"A. Yes, sir.

"Q. Is there anything you want to ask the Court in reference to this? Anything you don't understand about the jury waiver?

"A. No, sir."

On June 16, 1975, immediately prior to commencement of the trial before the three-judge panel, a conference took place among all the counsel and judges participating in the cause. The subject of the three-judge panel and the number of judges necessary to render a verdict was discussed. Although there was disagreement among the members of the conference concerning the matter, a decision as to the proper rule of law was not made at that time. Apparently, Ruppert was never told that there were serious questions concerning the number of votes necessary to convict under a three-judge panel.*

* Shortly, after trial commenced on June 16, 1975, Judge Cramer again questioned Ruppert concerning his jury waiver:

"Q. [J. Cramer] Alright, Mr. Ruppert, last week you appeared here in court with counsel and waived in writing your right to trial by jury and it was accepted at that time. We want to now make an inquiry of you if you are standing by and reaffirming that written waiver of trial by a jury and submit to be tried by the panel of three judges who are seated here?

"A. [Ruppert] Yes, sir.

"Q. You do not wish to withdraw your waiver of trial by jury?

"A. No, sir.

"Q. *And you reaffirm the fact, do you, that such waiver was executed in accordance with what we stated at the time you did execute it* that you were doing it voluntarily and knowingly and fully understanding all of your rights that you have under the Constitution of the United States and Ohio and the law of this state respecting your right to trial by jury having been fully explained to you by the Court as well as your counsel? Is that correct?

"A. Yes, sir.

"Q. And you are standing by that waiver and wish not to withdraw it at this time which you are permitted to do if you wish to and the jury will try this case?

"A. No, I want it to be as it is.

"Q. And it is and you want to stand by your waiver of trial by jury?

"A. Yes, sir." (Emphasis added.)

After hearing the testimony and reviewing the affidavits and evidence of record concerning the events surrounding the jury waiver, a majority of the trial court overruled defendant's motion for new trial on the basis that he must have decided to waive a jury trial not only because of his reliance on information furnished by defense counsel and the court concerning the unanimity of the three-judge panel in rendering a guilty verdict, but also because of several other important tactical considerations. The majority reasoned, *inter alia,* that defendant must have been informed by his counsel that in the sentencing stage of an aggravated murder trial tried by a three-judge panel a sentence of death requires the unanimity of three judges as compared with the decision of one judge in a jury trial.

On appeal, the Court of Appeals reversed the judgment and sentence of the trial court and remanded the cause for a new trial on the basis that defendant could not have knowingly, intelligently, and voluntarily waived his right to a

jury trial where he was misinformed about the number of judges necessary to convict on a three-judge panel.

The cause is now before this court upon the allowance of a motion and cross-motion for leave to appeal.

Mr. John F. Holcomb, prosecuting attorney, and *Mr. Daniel G. Eichel,* for appellant and cross-appellee.

Messrs, Holbrock, Jonson, Bressler & Houser, Mr. Hugh D. Holbrock and *Mr. H. J. Bressler,* for appellee and cross-appellant.

SWEENEY, J. The first issue confronting this court is whether an accused charged with an offense punishable by death who has waived his right to a trial by jury may be convicted only by a unanimous vote of the three-judge panel. R. C. 2945.06 clearly provides that in a criminal case involving the death penalty tried to a panel of three judges the "* * * judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly."

Although the above portions of R. C. 2945.06 have never been repealed, it is contended that the provisions have been repealed by implication since under the new sentencing procedures set forth in R. C. 2929.03, it is provided that the death sentence may only be imposed by a three-judge panel when it unanimously finds that none of the mitigating circumstances listed in R. C. 2929.04 (B) have been established by a preponderance of the evidence. R. C. 2929.03 (E). It is reasoned that if a majority of the judges was empowered to enter a verdict of the guilt determining phase of the trial, then presumably, in this situation, there would be no need for a mitigation hearing, since the dissenting judge would prevent a unanimous finding with respect to the absence of any of the mitigating

circumstances. If it happened, upon conducting a mitigation hearing in such a situation, that the three-judge panel were to agree unanimously that none of the mitigating circumstances existed by a preponderance of the evidence, a totally unacceptable situation would result.

In support of the contention that R. C. 2945.06 has been repealed by implication is the committee comment to R. C. 2929.03 reflecting the belief that no matter whether the capital case is tried to a twelve-member jury or a three-judge panel, the verdict must be unanimous.

Repeals by implication are disfavored in the law. *State, ex rel. Toerner,* v. *Common Pleas Court* (1971), 28 Ohio St. 2d 213, 217; *Cincinnati* v. *Thomas Soft Ice Cream* (1977), 52 Ohio St. 2d 76, 79. Only where the provisions of the two statutes are irreconcilable by any means of interpretation (*In re Hesse* [1915], 93 Ohio St. 230, 234) or are so repugnant to or contradictory with each other as to evidence an intent on the part of the General Assembly to change the statutory law will this court conclude that the earlier statute has been superseded by the later statute, and therefore of no force and effect. *Goff* v. *Gates* (1912), 87 Ohio St. 142; *Henrich* v. *Hoffman* (1947), 148 Ohio St. 23, 26.

For example, in *State* v. *Miller* (1977), 49 Ohio St. 2d 198, at 204, this court was confronted with the issue of whether that portion of R. C. 2945.06 granting the court the power to reduce punishment for capital offenses to life imprisonment was still valid in light of the newly enacted sentencing provisions of R. C. 2929.03 and 2929.04. We held that the former provision, although not formally repealed, was superseded. Clearly, the provision granting to the court the power of extending mercy in the sentencing phase of an aggrevated murder trial was in direct conflict with newly established sentencing procedures.

However, those portions of R. C. 2945.06 under consideration in this cause are not in direct conflict with any of the newly-enacted provisions of the Ohio Criminal Code (Am . Sub. H. B. No. 511, 134 Ohio Laws 1866) . Clearly, R. C. 2929.03 (E) , requiring unanimity of the panel of three judges in imposing the death sentence, and R. C. 2945.06, allowing a majority of the panel to render a guilty verdict, deal with separate phases of the aggravated murder trial.

Nor is this court convinced that in some way R. C. 2945.06 and 2929.03 are so repugnant to or inconsistent with each other as to evidence an intent on the part of the General Assembly to repeal the former section, R. C. 2945.-06.

An additional consideration convinces this court that the General Assembly never intended that the requirements of unanimity of the three-judge panel under R. C. 2929.03 (E) supersede the provisions of R. C. 2945.06 relating to the prescribed number of votes necessary to convict.

The power to hear and try criminal cases in which the accused has waived his right to a jury trial is specifically granted judges under R. C. 2945.06. *State* v. *Smith* (1931) , 123 Ohio St. 237, 241 (decided under former G. C. 13442-5) . Under this section, any judge of the court may hear the case so long as it does not involve an offense punishable by death. If an offense is punishable by death, then only a three-judge panel, composed of specifically designated members of the court, may hear the case and render a verdict upon a majority vote of its members. Clearly, these jurisdictional provisions have not been superseded by subsequent statutes having nothing to do with the authority of judges to try criminal cases without a jury.

Finally, the court is aware of language found in *State* v. *Bell* (1976) , 48 Ohio St. 2d 270, 276, indicating that in a

case tried to a three-judge panel, the defendant need only convince one of the three judges "of the absence of evidence of guilt beyond a reasonable doubt." However, this statement did not constitute a holding in the case, but rather served as part of an analogy to support the proposition that a defendant under R. C. 2929.03 (C) (1) (2) and (E) is not coerced or compelled in waiving his right to a jury trial. Our holding in this case in no way weakens the analogy made in *Bell, supra.*

This court, having determined that the three-judge panel may render a guilty verdict in an aggravated murder trial by a majority vote of its members, is confronted with the issue of whether application of majority rule in the first phase of an aggravated murder trial is in some way constitutionally defective.

In *State* v. *Robbins* (1964) , 176 Ohio St. 362, this court was presented with a similar issue in upholding the constitutionality of former R. C. 2945.07 (repealed under the new Ohio Criminal Code) . That section provided that in felony cases other than capital cases, an accused could waive his right to a trial by jury and file a request with the court to be tried before a three-judge panel, and further provided that if the request were granted, a majority of the panel could determine the guilt or innocence of the accused.

Although *Robbins, supra,* involved a non-capital felony case tried to a three-judge panel under former R. C. 2945.-07, the court finds the reasons given in that case for upholding the constitutionality of less-than-unanimous verdicts by a three-judge panel applicable in this cause.

As noted in *Robbins, supra,* at pages 363-364, a defendant in a criminal case may waive his constitutional right to a jury trial or to a jury of 12. If a defendant may waive this right, he may also waive his right to have a unanimous verdict. The right to a unanimous verdict at-

taches to the right of a jury trial, and as the latter may be waived, so may the former.

The court, as in *Robbins,* finds nothing inherently unlawful in permitting a three-judge panel to render a verdict based on a majority vote of its members. Requiring less than a unanimous verdict in a non-jury trial in no way lessens the prosecution's burden of proving the accused guilty of the charge beyond a reasonable doubt. *Robbins, supra,* at pages 364-365. See, also, *Johnson* v. *Louisiana* (1972), 406 U.S. 356, 360-362. Furthermore, the requirement of unanimity of the triers of fact in a criminal trial has historically been associated with a jury trial and not a trial before the court. *Patton* v. *United States* (1930), 281 U. S. 276, 288; *Apodaca* v. *Oregon* (1972), 406 U. S. 404. In short, nowhere can this court find support for the proposition that unanimity of the three-judge panel is constitutionally mandated where an accused has waived his right to a jury trial in a capital case.

The court concludes, therefore, that the provision of R. C. 2945.06 empowering a majority of the three-judge panel to render a guilty verdict in a capital case is constitutional.

The final issue confronting this court is whether the accused knowingly, intelligently and voluntarily waived his right to a jury trial under Crim. R. 23. As noted in *Patton, supra,* at page 312, trial by jury is the normal, if not preferable, mode of disposing of issues of fact in criminal cases and the right must be jealously preserved. *See Estrada* v. *United States* (C. A. 7, 1972), 457 F. 2d 255 It "reflect[s] a profound judgment about the way in which law should be enforced and justice administered." *Duncan* v. *Louisiana* (1968), 391 U. S. 145, 155. Therefore, the court must insure that the accused's decision to waive such right is made with a sufficient awareness of the relevant circumstances and likely consequences of his waiver. *Brady* v. *United States* (1970), 397 U. S. 742, 748; *State* v. *Sharp* (Mo. 1976), 533 S. W. 2d 601; *State* v. *McKay* (1977), 280 Md. 558, 375 A. 2d 228. Whether or not there is a valid waiver depends on the unique circumstances of each case. *Adams* v. *United States* (1942), 317 U. S. 269, 278.

In the instant cause, Ruppert was misinformed that only a unanimous verdict of a three-judge panel could convict him of the offenses if he were to waive his right to a jury trial. Clearly, the defendant was not informed of an important consequence of his decision to waive a jury trial. As observed previously, by waiving his right to a jury trial, Ruppert not only was foregoing the right to be tried before a panel of 12 jurors, but also was waiving his right to a unanimous verdict. Irrespective of whether other important tactical considerations entered into his decision to waive a jury trial, Ruppert could not have knowingly, voluntarily and intelligently waived this right where he was misinformed as to the consequences of his decision in being tried before the court.

In conclusion, because this court finds that under R. C. 2945.06 only two of the three judges need concur in determining the guilt or innocence of the accused in an aggravated murder trial tried before the court, and because Ruppert was misinformed of this important consequence resulting from his jury waiver, the judgment of the Court of Appeals reversing the conviction and sentence of Ruppert and remanding the cause for new trial is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, STEPHENSON, P. BROWN and LOCHER, JJ., concur.

CELEBREZZE, J., concurs in the judgment.

STEPHENSON, J., of the Fourth Appellate District, sitting for W. BROWN, J.

APPENDIX B

Opinion of the Court of Appeals, Butler County, First Appellate District of Ohio, August 3, 1977.

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
BUTLER COUNTY, OHIO

NO. CA75-08-0067

STATE OF OHIO,
Plaintiff-Appellee,

v.

JAMES U. RUPPERT,
Defendant-Appellant.

DECISION

(Filed August 3, 1977)

Mr. John F. Holcomb, Prosecuting Attorney, 310 Rentschler Building, Hamilton, Ohio 45011, for Plaintiff-Appellee,

Messrs. Holbrock, Jonson, Bressler & Houser, Hugh D. Holbrock and H. J. Bressler of counsel, 315 South Monument Avenue, Hamilton, Ohio 45011, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas of Butler County, Ohio, the transcript of the proceedings, the assignments of error, the briefs and the arguments of counsel.

Ruppert appeals from his conviction by two members of a three-judge court convened under R. C. 2945.06 after he had waived a jury trial. By that same majority, he was sentenced to eleven consecutive life terms, one for each of eleven murders. He assigns eight errors, the second of which we find well taken. We reverse and remand for a new trial.

The record discloses that Ruppert was indicted for eleven aggravated murders with specifications. The evidence that he killed his mother, his brother, his brother's wife and their eight children (aged four to seventeen years) was overwhelming and not controverted. Ruppert's defense was that he was insane. The State replied that he was sane, that he was in need of money, and that he disposed of his next of kin out of jealousy and hatred and greed. The State's theory of the case was that he stood to inherit $300,000.00 as the sole survivor, if he could beat the murder charges by being found not guilty by reason of insanity and then obtain release from the hospital for the criminally insane once he was "restored to reason."

Additional facts will be disclosed in connection with the assignment of error which will be considered in the same order they were presented.

I.

The Court erred in holding that the defendant could be convicted by a majority of the three-judge panel and in overruling a motion for a new trial on that basis since a verdict of a three-judge panel must be unanimous.

This assignment presents two issues: (A) whether R. C. 2945.06 was repealed by implication through the enactment of the 1974 Ohio Criminal Code; and (B) if not, whether the provisions of that section for a majority decision of all questions of fact and law violate the constitutional requirements for equal protection of law. That section reads in full as follows:

> § 2945.06. Jurisdiction of judge when jury trial is waived; three-judge court.
>
> In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. *If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges,* consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the Supreme Court. *Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly.* If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pronounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be compensated for his services as provided by section 141.07 of the Revised Code. (Emphasis supplied.)

A.

We conclude that this section was not repealed by implication. Claiming the contrary, Ruppert points to the "Committee Comment" to R. C. 2929.03, one of three sections of the 1974 Criminal Code providing penalties for aggravated murder and murder. These new sections require a two-step procedure when the charge is for aggravated murder with specifications; the first step is the determination of guilt, and the second is the determination of penalty (that is, whether the death penalty shall be imposed). The third paragraph of the "Committee Comment" states that the procedure is essentially the same in the first step of a capital case whether it is tried by a jury or a three-judge panel and concludes by saying that the three-judge panel's verdict must be unanimous.[1] This argument is not persuasive, because a report of the Legislative Service Commission may not be used to give meaning to a legislative enactment other than that which is clearly expressed by the General Assembly. *Cleveland Trust Co.* v. *Eaton* (1970), 21 Ohio St. 2d 129, at 138. Such comments are helpful, *Weiss* v. *Porterfield* (1971), 27 Ohio St. 2d 117, but not even the sponsor's opinion is entitled to conclusive

[1] The pertinent part of the "Committee Comment" (actually the comments of the Legislative Service Commission, an organization serving the General Assembly, and not a committee of either house) states as follows:

> "The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous."

weight. We must look to the legislative language itself. No statement as to the meaning of a statute is conclusive unless it comes from the legislature itself. *State* v. *Edwards* (2d Dist. 1976), 50 Ohio App. 2d 63. House Bill No. 511, enacting the new Criminal Code, expressly repealed R. C. 2945.07 (providing for an optional three-judge court in noncapital felony cases) but it left both R. C. 2945.05 and 2945.06 in full force and effect, thus expressing an intent, in our judgment, that the three-judge court shall act by majority vote in the first step of a capital trial.

Defendant also points to a statement made in *State* v. *Bell* (1976), 48 Ohio St. 2d 270, which seems to equate the unanimity required of a jury for a finding of guilt with a required unanimity for a three-judge panel.[2] However, we are persuaded, after careful and respectful analysis, that this statement is *obiter dictum*. The issue being discussed in *Bell* was whether the provisions of R. C. 2929.04 (B), requiring unanimity of the three judges before the death penalty can be imposed, so outweigh the advantages of a trial by jury that the new provisions have the practical effect of denying an accused murderer a trial by jury. After a jury trial, the trial judge sitting alone makes the penalty decision. The Supreme Court decided that the advantages and disadvantages of going to a jury or going to a three-judge panel are so balanced that the new law is not impermissibly weighted against jury trial. The court did not decide in *Bell* that the three judges must be unanimous in all decisions of fact and law in the first trial phase of a capital murder case.

[2] The full paragraph referred to reads as follows, beginning at p. 275:

> "Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one. The balance struck by these competing considerations is for the judgment of the defendant and competent trial counsel."

We note that in *State* v. *Miller* (1977), 49 Ohio St. 2d 198, at 204, the court held that those provisions of R. C. 2945.06 which permit a three-judge court to extend mercy and reduce the death penalty to life imprisonment, although not expressly repealed, have in effect been declared unconstitutional by *State* v. *Leigh* (1972), 31 Ohio St. 2d 97 and have been superseded by R. C. 2929.03 and 2929.04. This leaves the balance of the section in full force and effect.

B.

We are not persuaded that the provisions for majority rule in the guilt phase of a capital case violate the constitutional requirements of equal protection and due process. The Supreme Court of the United States has decided that there is nothing unconstitutional in providing for majority verdicts in criminal cases. *Apodaca* v. *Oregon* (1972), 406 U.S. 404, and *Johnson* v. *Louisiana* (1972), 406 U.S. 356.

Further, the Ohio Supreme Court has held that the provisions of R. C. 2945.07 (now repealed) whereby the defendant could waive a jury and have his noncapital felony case tried to three judges were constitutional. The defendant can waive any and all of his rights granted by the Constitution, including his right to a jury, and the provisions for majority rule in a three-judge court are both reasonable and not inconsistent with historical and constitutional requirements. *State* v. *Robbins* (1964), 176 Ohio St. 362. All three cases involved noncapital offenses; nevertheless, we believe that they are applicable to the first phase of a capital case.

The principle of unanimity is preserved in the second and most crucial step, because the judges cannot impose the death penalty unless all three agree.

We find that the provision in R. C. 2945.06 for the trial of a capital offense before a three-judge panel, which may decide by majority vote all the questions of fact and law in the trial, is a reasonable and valid alternative for the determination of guilt. All accused persons who elect to waive the jury and go to a three-judge court are provided with the same procedure. There is equal protection of law. The first assignment of error is not well taken.

II.

The court erred in failing to grant defendant a new trial on the basis that his jury waiver was not knowing, voluntary and intelligent since he had been informed by counsel and the presiding judge that the panel's verdict must be unanimous.

During a pre-trial hearing on jury waiver, the presiding judge told Ruppert that the three-judge panel must be unanimous on the issue of guilt and the issue of insanity at the time of the offense.[3] The defendant clearly understood

[3] The following exchange took place during the hearing on jury waiver:

"Q. (PRESIDING JUDGE) Now, you understand that when you are tried by a jury which you are waiving, before you can be found guilty or not guilty of any one or all of the 11 counts, all 12 of the jurors must agree?

A. (RUPPERT) Yes, sir.

Q. But where three judges hear the case as you have consented and asked to be done, just all three have to agree?

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. You also understand, do you, that if you have a jury before they can find in accordance with your defense that you were sane or insane at the time of the alleged commission of said offenses, all 12 of the jurors must agree. However, if three judges hear your case as you have requested to be done before the three judges can find that you were sane or insane at the time of the alleged commission of the offenses, all three must agree on that?

A. Yes, sir.

Q. I'm pointing this out to you, the difference between when the jury hears a case and three judges.

A. Yes, sir.

Q. And you wish to without any question, to waive your trial by jury, is that right?

A. Yes, sir."

these statements, and nothing in the record shows that he was ever advised of the contrary. On the first day of the trial, before proceeding with any other matter, the presiding judge brought Ruppert before the bench with his counsel to determine whether he reaffirmed his jury waiver in accordance with what the court had stated at the time the waiver was first presented. The defendant stated, "I want it to be as it is."[4]

The record shows that the presiding judge expressed his bona fide conclusion about the state of the law without intending to mislead Ruppert or his counsel, and without ulterior motive. He maintained that position throughout the trial.

[4] Our decision is grounded solely on what the judge told the defendant in open court, even though the record tends to establish other facts: that the presiding judge agree [*sic*] with defense counsel in an informal conference in chambers without the presence of the defendant or the prosecutor that unanimity was required for a finding of guilty; that in a subsequent informal conference in chambers on the first day of the trial, before the three judges proceeded into the courtroom, defense counsel raised the question again and were advised by one of the other judges, "We will cross that bridge when we get to it"; that neither the prosecutor nor any of his assistants raised any question or noted any exception to this ruling on the record; and that defense counsel's advice to defendant was that unanimity was required for findings of guilt. In the light of our conclusion, these facts are not material to disposition of the second assignment of error.

The record also discloses that the other two judges did not know until after the trial that the presiding judge had told the defendant the three judges had to be unanimous on guilt and on insanity. They were not present at the waiver hearing. No judge knowingly or intentionally mislead Ruppert about the question of majority vote.

The issue is one of first impression. Experienced person in all branches of the legal profession could reasonably come to opposite conclusions. Two judges decided that they could act under R. C. 2945.06, and they found Ruppert guilty of all eleven murder counts and all eleven specifications, imposed the consecutive life sentences, and denied the motion for a new trial.

We conclude that error prejudicial to the defendant was committed because his waiver of jury trial was not made knowingly and voluntarily. He knew the decisions about guilt and insanity would not be decided by a jury, but he was not aware that under the law a majority of the panel could find him guilty. What he consented to was a trial before a panel which had to be unanimous in all guilt findings. What he got was a trial where a majority of two could find him guilty, but he was not made aware of that until after the panel had made its final determination of guilt.

Ruppert's jury waiver was not given with full understanding of a fundamental factor in his trial. The waiver was not "knowing" because he did not, at the time, know that two judges could rule him guilty. Since it was not knowing, the waiver could not be voluntary.

We conclude this case is governed by established principles of fairness. In *Henderson* v. *Morgan* (1976), 426 U.S. 637, the defendant's defense to a charge of murder might well have been that he had no intent to kill. He pled guilty to second degree murder, but the court failed to advise him that in so doing he admitted he intended to

cause the death. The Supreme Court vacated the judgment on the grounds that the plea was not knowingly and voluntarily made. In *State* v. *Sharp* (Mo. 1976), 533 S.W. 2d 601, the defendant's waiver of jury trial was made on the mistaken expectation that he could withdraw his waiver if at the conclusion of the trial procedure the judge refused to grant probation. The defendant expected a procedure regularly followed by that judge, whereas the judge approached the peculiarities of that case with an entirely different intention. In *Commonwealth* v. *Hooks* (1973), 450 Pa. 562, 301 A.2d 827, a jury waiver was ruled invalid when the defendant, even though he had said he was willing to sign the waiver, and did sign it, stated that he really did not understand "some of the things."

In the instant case, the essential unfairness is a demonstrable reality and not a matter of speculation. See *Adams* v. *U.S. ex rel. McCann* (1942), 317 U.S. 269, at 281.

The second assignment of error is well taken.

III.

The court erred in receiving into evidence various exhibits which individually and in total prejudiced the defendant and deprived him of a fair trial.

By this blanket assignment defendant claims error in the admission of 103 of the State's exhibits and we are required by App. R. 12 (A) to pass upon this assigned error in writing. These exhibits were offered to substantiate the State's position that Ruppert murdered his family by prior calculation and design (i.e., to obtain their property). Five of them were not received by the court (Exhibits 182 188, 194, 194 (A) and 200), and four were missing from the record (Exhibits 160, 161, 162 and 201). We find no error in the admission of 73 exhibits attacked by this

assignment of error, but we find error in admitting 21 exhibits, as set forth in the succeeding paragraphs.

It was error to receive four handwritten "loan agreements" (Exhibits 95, 96, 97 and 98), because the defendant's signature as a borrower from his mother or his brother was not identified, because they were all past due on the day of the killings and because there was a total absence of evidence as to their current statue (whether still outstanding, or paid in part or in full).

The court erred in admitting the signature and ledger cards for the defendant's purported savings account at Columbia Federal Savings and Loan Association of Hamilton (Exhibits 103 and 104), because the evidence of identity and authentication was insufficient to meet the requirements of R. C. 2317.40, the Uniform Business Records as Evidence Act.[5] The signature was not identified as having

[5] We conclude that R. C. 2317.40 can properly be used for the admission of business records in a criminal case, provided that the defendant's constitutional rights to confront the witnesses against him and to cross-examine them are not violated. In the instant case the purpose for which the business records were offered was to establish the fact that the decedent's brother and his family had property that, presumably, would be inherited by defendant if he were the sole survivor of the family. While such evidence relates to the issues of sanity and purpose, we conclude that the rights of confrontation and cross-examination do not prevail. In *State* v. *Kehn* (1977), 50 Ohio St. 2d 11, the Supreme Court held that deposit slips properly qualified under R. C. 2317.40 were admissible for the purpose of showing the deposit of a payoff in coin to the defendant police officers following the burglary of a vending machine company. It all depends upon the purpose for which the exhibits are offered. If they are offered to connect the defendant directly to the commission of the crime, then they must be proved by persons with personal knowledge who are subject to cross-examination. *United States* v. *Lipscomb* (5th Cir. 1970), 435 F. 2d 795, *cert. den.* 401 U.S. 980, *reh. den.* 402 U.S. 966; *State* v. *Matousek* (1970), 287 Minn. 344, 178 N.W.2d 604. The rights of confrontation and cross-examination prevail in the introduction of the record of a physical examination of a rape victim where the defendant claims he never had sexual intercourse with the girl. *State* v. *Tims* (1967), 9 Ohio St. 2d 136. *State* v. *Phillips* (6th Dist. 1951), 90 Ohio App. 44.

been made by the defendant, the address in these records was not shown to be the defendant's address, and there was no information within the four corners of these documents that connected them with the defendant.

The signature cards for ten savings accounts at West Side Federal Saving and Loan Association of Hamilton, Ohio, in the names of the defendant's brother and other members of his family (Exhibits 108 through 117) also should not have been admitted over defendant's objection, because the State failed to comply with the fundamental specifics of R. C. 2317.40. The evidence was relevant to the issues of sanity and purpose; the witness, an assistant vice president of the Association, can be deemed to be a person who "supervised" the making of the record. *City Products Corp.* v. *Board of Liquor Control* (10th Dist. 1958), 79 Ohio L. Abs. 481, 156 N.E.2d 347. However, the witness failed to testify as to the mode and time of preparation, and the record fails to show compliance with the mandatory requirements of R. C. 2317.40.[6]

In the instant case, we conclude that R. C. 2317.40 may be used to prove ownership of property (whether belonging to the defendant or the victims) when that ownership itself is not one of the essential elements of the offense, even though this procedure eliminates defendant's rights of confrontation and cross-examination. However, the specific requirements of R. C. 2317.40 as to identity and authentication are mandatory.

[6] After the witness, Donald A. Schwab, read from the ten cards the signatures, the dates and the account numbers, and stated the current balances, the following took place:

> "Q. All right, now Mr. Schawab (sic), have the documents which have been marked for identification as State's Exhibits 108, through 117, been kept and maintained by West Side Federal as business records in the normal course of doing business?
>
> A. That's right.
>
> JUDGE CRAMER: When did you say Leonard and Alma as custodians' account was opened?

The records from both savings and loan associations failed to meet the first mandatory requirement for admissibility. As stated in *Dillow* v. *Young* (10th Dist. 1965), 3 Ohio App. 2d 110, reversed on other grounds, (1966), 6 Ohio St. 2d 221, there are two major requirements for admissibility under R. C. 2317.40. First, the reliability of the document must be demonstrated: (1) the custodian or person who supervised the making of the record must testify (2) to its identity, (3) the mode of its preparation, and (4) if it was made in the regular course of business, at or near the time of the act or events it tends to establish. Compare McCormick, *Evidence* 722, § 308 et. seq. (2d ed. 1972). The second major test for admissibility can be met *only* after the business record has been "identified and authenticated in the manner specified in the statute itself." *Weis* v. *Weis* (1947), 147 Ohio St. 416, at 424. The second requirement is that the evidence asserted in the business records shall be admissible under the general rules of evidence. While the trial court has discretion under the statute to determine reliability (Whether the sources of information and the method and time of preparation were such as to justify admission), the total absence of any evidence upon which such discretion might be exercised is cause for error. Compare *In re Daniels' Estate* (1949), 185 Ore. 642, 205 P.2d 167.

In contrast, the witness who identified the signature card and ledger sheets from the Miami Savings & Loan

---

A. March 31, 1975 — wait a minute, January 6th, 1973.

MR. FISCHER: Your witness.

MR. BRESSLER: I have no questions.

Witness excused.

MR. FISCHER: If the court please, we will offer as exhibits State's 108 through 117.

MR. HOLBROCK: Object.

JUDGE CRAMER: Overruled, we'll admit them."

Company of Miamitown, Ohio, relating to a joint account in the name of the brother and his wife, identified their signatures. His testimony fulfilled the mandatory requirements of the Uniform Business Record As Evidence Act.

Copies of title documents and mortgage accounts relating to property owned by the brother and his wife (Exhibits 128 and 129) were improperly admitted because not properly authenticated. The title documents were not certified by the Recorder, and the attorney for the estates could not qualify as either the custodian or the person who supervised the making of the mortgage accounts.

The following documents were improperly admitted because not relevant to the issues in the case: the rider to a policy of insurance (Exhibit 163); defendant's miscellaneous papers and documents (Exhibit 196); and a congratulatory card on high school graduation addressed to "Jimmy" (Exhibit 199).

However, we conclude that the errors noted above are not reversible errors, because the admission of these documents neither prejudiced the defendant under Crim. R. 33 (E) (3) nor affected his substantial rights under Crim. R. 52 (A). The 73 exhibits which were admitted without error provide credible evidence of probative value to demonstrate that the deceased members of defendant's family had property of recognizable value. The elimination of the matters sought to be established by the excluded exhibits leaves behind substantial other evidence tending to prove the State's theory of the case. We cannot say the defendant was prejudiced by the admission of the 21 exhibits discussed above.

The third assignment of error is not well taken.

IV.

The court erred in permitting in evidence the opinion testimony of Louis Hofstadter as to the law of the State of Ohio.

Louis Hofstadter's testimony concerned the devolution of property when there is but one survivor in a family; in other words, how the property of the eleven deceased person would descend under Ohio law. This testimony was in the nature of surplusage because under Criminal Rule 27 (which incorporates Civil Rule 44.1), the trial court must taken [*sic*] judicial notice of the decisional, constitutional and public statutory law of this State.

Appellant fails to point out, and we do not find, any point of law stated by Mr. Hofstadter which was erroneous, or otherwise to the prejudice of Ruppert.

The fourth assignment of error has no merit.

V.

The court erred in admitting the opinions of eighteen (18) lay witnesses as to the sanity of James Ruppert.

It is well settled in Ohio that lay witnesses may give their opinions of the accused's sanity. *Clark* v. *State* (1843), 12 Ohio 483.

Headnote 10 of *State* v. *Miller* (C.P. Seneca County 1895), 5 Ohio Dec. 703, aff'd without opinion (1896), 55 Ohio St. 685 reads as follows:

> "Non-expert witnesses, called upon to give their opinions as to the sanity or insanity of accused, are required to state facts upon which such conclusions are based, and are entitled to much, little or no weight according to witnesses' familarity with accused, their

> means of knowing and observing him, as well as their manifest intelligence, and fairness or unfairness toward him."

In the instant case, each lay witness who expressed an opinion about defendant's sanity first recited sufficient acquaintanceship with defendant to form a basis for an opinion. This basis was not destroyed, as a matter of law, by cross-examination. The evidence was admissible, and the weight attributable thereto lay in the sole province of the panel.

We overrule defendant's fifth assignment of error.

VI.

The court erred in considering the testimony of Wanda Bishop and in overruling defendant's motion made after verdict for a new trial on the basis that the testimony of Wanda Bishop was not believable and was perjured.

Wanda Bishop testified that she was in love with James Ruppert and had spent every evening with him between October 30, 1974 and March 29, 1975. Five evenings a week they could be found at the 19th Hole Cocktail Lounge. On March 29, 1975, Wanda said she spent the evening with Ruppert at the 19th Hole. He told her that his mother had said that if he could drink seven days a week in a bar, he could afford to help pay the rent or move out. Wanda further testified that defendant left the 19th Hole at around 11:30 P.M., saying he had a problem he was going to take care of then and there. When he returned 30 minutes later, Wanda asked if he had taken care of his problem, to which he replied, "No, not yet."

The prosecution relied on Wanda's testimony to indicate that there had been trouble between Ruppert and his mother and to indicate prior calculation and design on Ruppert's part.

While only minimally corroborated and largely contradicted by other witnesses, Wanda's testimony was internally consistent. It is well settled that the trier of facts, whether judge or jury, is the judge of the credibility of witnesses and of the weight to be attached to their testimony. *State* v. *Cox* (Ohio App. 1946), 70 N.E.2d 394. See also *Butzman* v. *U.S.* (6th Cir. 1953), 205 F.2d 343, *cert. den.* 346 U.S. 828. We do not believe that this witness has been discredited so completely that an appellate court must intervene on the ground that "the trier of the facts manifestly lost its way, or became confused, or responded to bias or prejudice." *State* v. *Culp* (3rd Dist. 1971), 32 Ohio App. 2d 39, at 50

We have considered the case of *State* v. *Milam* (8th Dist. 1959), 108 Ohio App. 254, cited by the defendant, in which the appellate court found that the testimony of certain prosecution witnesses was entitled to no weight. We cannot ascribe great precedential value to that decision, for two reasons: (1) Three opinions were written ("majority", concurring and dissenting opinions) and only the "marjority" opinion discards the testimony of the witness because it flew in the face of all other evidence; and (2) That case has never been cited, nor does it appear to stand, for the proposition that an appellate court may declare a witness's testimony totally unworthy of belief and entitled to no weight, in the absence of a showing that the fact finder lost its way or was confused, biased or prejudiced.

Finding no solid ground from which to reject Wanda Bishop's testimony as a matter of law, we conclude that the sixth assignment of error has no merit.

VII.

The court erred in admitting the documents, in admitting the testimony of lay witnesses, as to sanity, in admitting the testimony of Louis Hofstadter, and in admitting the testimony of Wanda Bishop, and these admission had a cumulative effect of denying defendant every semblance of due process of law and equal protection of law to such an extent that his conviction cannot stand.

This assignment of error is a reprise of the preceding four assignments. Looking back over those four, the defendant claims that the cumulative effect of receiving in evidence the documents and the testimony attacked in those four assignments is to deny defendant due process, equal protection, and a fair trial. Rather than assuming that defendant intends this assignment of error to be a general catch-all, we will consider it to raise the issue of whether Ruppert had a fair trial when these exhibits and this testimony were received into evidence, even though it was not reversible error to have received any one of the four catgories of evidence. We proceed on this basis, because, if any one of those four preceding assignments had been found well taken, then the seventh assignment of error would be repetitious surplusage. We are willing to examine the cumulative effect of several actions by the trial court, no one of which constituted reversible error by itself.

Viewing the record as a whole, we conclude that the cumulative effect of the four portions of the evidence attacked by this seventh assignment of error is not sufficient to rise to the level of reversible error. We found error in the admission of 21 out of 94 documents but held that error to be harmless. Considering that finding together with the "largely impeached" testimony of Wanda Bishop,

the "unnecessary" testimony of Louis Hofstadter and the opinions of the lay witnesses as to Ruppert's sanity, we cannot say that established principles of due process and fair trial have been violated. This was a hotly contested trial skillfully waged by counsel, with a great deal of evidence on both sides of all determinative issues. The court did not err in receiving relevant evidence; that is, evidence having any tendency to make the existence of any fact that was of consequence to the determination of the issues more probable or less probable than it would have been without the evidence. We find no error.

The seventh assignment of error is not well taken.

VIII.

> The judgment and conviction of the defendant-appellant is against the manifest weight of the evidence and contrary to law, and the court thus erred in refusing to acquit defendant and also erred in refusing to either acquit the defendant or grant his motion for a new trial.

The issue presented is whether the evidence against Ruppert was so insufficient as to require either his acquittal or a finding of not guilty by reason of insanity. The focus is on his mental state at the time of the offense — whether he acted purposely and with prior calculation and design, or was insane. A person is insane when disease or other defect of his mind has so impaired his reason that at the time of the criminal act with which he is charged, *either* he did not know that such act was wrong *or* he did not have the ability to refrain from doing that act. *State* v. *Staten* (1969), 18 Ohio St. 2d 13.

Ruppert was examined by twelve mental experts: nine psychiatrists, of whom six testified for Ruppert and three for the State; and three psychologists, of whom two testified

for Ruppert and one for the State. Opinions of the experts who testified for Ruppert are in clear conflict with those who testified against him and all four of those against him stated that in their respective opinions, he knew the act was wrong and he had the ability to refrain from doing it. All of the defense experts stated that he could not refrain from doing the wrong, but some of these experts said that he knew it was wrong.

This state of the record raises in classic form the type of factual question which has traditionally resided in the sole province of the trier of facts. We have examined the testimony of each of these twelve experts, and construing the State's evidence most favorably to defendant,[7] we cannot say that as a matter of law the evidence was insufficient to sustain the conviction or that the judgment is against the manifest weight of the evidence.

Finally, our review of the entire record discloses that the judgment and conviction of Ruppert were not against the manifest weight of the evidence.

The eighth assignment of error is not well taken.

The second assignment of error being well taken, we reverse and remand for a new trial.

BETTMAN, P. J., CASTLE and BLACK, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

---

[7] In construing the evidence most favorably to defendant, we find that the value of the expert opinion of Dr. D. A. Thomas was largely destroyed by extensive cross-examination. Assigning little or no weight to that testimony, we nevertheless find that there is credible evidence of probative value in the testimony of the three other State experts sufficient to raise a factual question for the sole consideration of the panel.

APPENDIX C

Rulings of the Court of Common Pleas, Butler County, Ohio, July 22, 1975. (Majority and dissenting opinions, Reproduced from Trial Transcript pages 1151-1157.)

Judge Marrs: Let the record show that the Court has listened to the arguments of respective counsel, discussed the merits initially in chambers, have perused the respective affidavits and after the conclusion of arguments again conferred. The majority of the Court would overrule the motion for a new trial. The basis for the overruling of the new trial, the majority of the Court would find that the defendant did knowingly and intelligently understand advice of counsel and that the considerations in making a determination to waive a jury, were not solely based on whether or not a Court could come to a unanimous conclusion. There were many other considerations that must have been considered. Now, obviously, in trying a matter to the Court long trial experience of counsel and certainly of the panel itself, its obvious to anyone if a matter is tried to a jury and 12 people would have to be convinced beyond a reasonable doubt of each and every essential element of the offense charged, its much more difficult to get more, 12 people, to unanimously agree upon a verdict than what it would be for three.

When we further look at the statutes concerning the penalties involved we find that if the matter is taken to a jury and where the death sentence is involved, then it only takes one judge to declare the penalty. That one judge must take into consideration before the death penalty can be given, three separate findings that these conditions do not exist. When the matter is taken to a three-judge panel and a decision is arrived at, there its specifically spelled out in the law that it takes all three or unanimously they must agree that the three conditions have not been established before the death penalty can be concluded.

Now in the instant case, there were two defenses raised: One, not guilty; the second, not guilty by reason of insanity. Not guilty by reason of insanity, much evidence of course was established in the course of the trial going to that defense. Now obviously if that defense is weighed and the weight of the — or the evidence offered to that defense 12 people certainly could be less likely to agree than a three-judge panel. So its immediately to the defendant's advantage at that point to waive the jury and try it to a three-judge panel. Likewise, it is to the defendant's advantage to try it to a three-judge panel when the death penalty is involved (as in this case) because there again, before the death penalty could be inflicted it requires unanimity of the three judges to the point that none of the circumstances of: Did the victim induce the crime? Was it done under coercion or strong feelings of emotion or (3) Was there a psychosis present? And, as in this case, the wisdom of waiving a jury was brought out by the panel's verdict on that point, being 2 to 1. No unanimity and, therefore, the death penalty was precluded. Now obviously these points that had to be discussed and thought through before the jury was waived. Its the majority's opinion on that point that these being practical matters they could not possibly be overlooked by competent counsel and consequently, the defendant took his chances with a three-judge panel.

Second, a motion for a new trial is based on misconduct of witness. We have not heard any evidence or argument concerning that particular point. However, I think since

in effect, this is akin to an appellate procedure and our Supreme Court has indicated an appellate court must take all of the points raised and make a ruling thereon, it must be shown that the witness, Wanda Bishop, was corroborated on four separate occasions by other witnesses on material that Wanda could have learned alone or could not have learned in any other way than from the mouth of the defendant. Particularly, she could know nothing about the relationship between the defendant and his mother and his brother concerning the living conditions at home unless he told her. And this was corroborated by Mrs. Clems, a witness brought forth by the defense. The fact that she was seen in a booth in the 19th Hole with the defendant's arm around her was again corroborated by Mrs. Farrell on one occasion. Now, yes, she recited more but at least once this was corroborated.

Likewise, the witness, Mrs. Swisshelm, indicated that the defendant had told her that he had at last found a girl that he was really interested in or could marry. And the witness Cornett corroborated some of the testimony of Wanda Bishop. The majority of the Court would overrule that ground as the basis for a new trial.

With regard to the third issue as to the lack of a unanimity as to the finding of the Court with regard to guilt or innocence, the Court could only reflect that the Statutes 2945.06 relate to the conduct of a trial and the statutes therein say that a majority of the judges on a three-judge panel shall decide all questions of law and of fact. And that was done in this case. Whereas Sec. 2903 and 2929.04 relate to Penalties and Sentencing mentioning only the word "unanimous" when it comes to the death penalty. And that's the law that was passed by the State legislature as it now stands on the books, the Ohio Revised Code. And, likewise, taking note of a decision by the United

States Supreme Court only last year to the extent that a legislature can provide without violating a defendant's Constitutional right of due process can provide for a lesser finding than unanimous in a criminal case. A legislature can provide for a lesser number than a unanimous finding.

> By the Court (Judge Cramer): It provides for a lesser number than 12. It didn't go into the question of unanimous.

Yes. Less number than 12. Likewise, by the State of Ohio letting 2945.06 stand, they have provided a means lesser than unanimous.

With regard to the fourth as to the weight of the evidence, the majority of the Court would find that it is not well taken and, therefore, would overrule the defendant's motion for a new trial.

(To Judge Fiehrer) Does that indicate your position?

Judge Fiehrer: Yes.

Judge Cramer: I must and therefore do respectfully dissent from my colleagues' decision denying defendant's motion for a new trial on all the grounds on which their conclusions are based except 1 which I will hereinafter refer to.

It is my opinion that the majority's failure to find the defendant was insane at the time he committed the offenses is contrary to law in that it is manifestly against the weight of the evidence. It is my opinion that the majority's verdict that the defendant was sane at the time of the commission of the offense is not sustained by sufficient evidence.

I believe the evidence preponderates in favor of the defendant's defense that he was insane at said time and therefor should have been found not guilty by reason of insanity. It is further my opinion that the State failed to

prove beyond a reasonable doubt that the 11 homicides were committed by the defendant with prior calculation and design as those terms are defined by law. Therefore, defendant could not be found guilty of aggravated murder as to any of the 11 persons who were killed. I am also of the opinion that a finding of either guilty of any crime, not guilty or not guilty by reason of insanity by a three-judge panel must be unanimously arrived at. The statute specifically providing for a three-judge panel's decision to be arrived at by a majority and in a capital case, the extension or non-extension of mercy also by a majority, though not specifically repealed when the new criminal code went into effect and the Criminal Rules adopted, I believe repealed by implication. Prior to January 1, 1974, the law permitted the extension or non-extension of mercy by a three-judge panel in a capital case by a majority of the judges. The law now provides that before the death sentence can be imposed the three judges must unanimously find that none of the mitigating circumstances has been established by a preponderance of the evidence. If a majority only is needed to come to a decision that a defendant has committed aggravated murder then in the event of a dissent as a practical matter the death penalty would never be imposed because the dissenter could and no doubt, would not join in a finding carrying with it the death penalty. Furthermore and more importantly, if a decision of a three-judge panel could be arrived at without unanimity but a jury's verdict must be unanimous which, of course, is the law then a defendant who chooses to be tried by a three-judge panel rather than by a jury which, of course, the law permits him to do in a capital case, by him waiving a jury, he is denied that equal protection of the law guaranteed by Art. 14 of the Amendment to the Constitution of the United States. For the State's burden

is considerably lessened and the defendant's increased because the State need not convince all three judges, trained and experienced in both fact-finding and applying the law as they are, therefore, more expertise than the average juror before securing a guilty verdict, a guilty finding. Therefore, the State's burden under such circumstances should not be lessened. Yet before a jury's verdict is secured all 12 unskilled laymen must agree. It would be our opinion that, therefore, legislation that permits a finding of guilty by less than a unanimous three-judge Court but requires a jury's verdict to be unanimous is unconstitutional. It would make the risk of a guilty finding greater, the price a defendant has to pay for his legal right to have a three-judge panel rather than a jury decide his fate.

In view of the Court's opinion that unanimity is required, the advice given to the defendant by his counsel prior to that given by the Court to counsel requiring unanimity would, in our opinion, require us to deny the defendant's motion for a new trial on that ground. In other words, in my opinion, in view of the fact that I believe unanimity is required, the defendant was not misled, was not misinformed respecting the requirement of unanimity. And, therefore, we have dissented from the majority's opinion overruling the motion for a new trial for the reasons stated.

APPENDIX D

Judgment Entry of Supreme Court of Ohio, May 17, 1978.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,)
)
City of Columbus.)

1978 TERM

To wit: May 17, 1978

THE STATE OF OHIO,
Appellant and Cross-Appellee,

vs.

JAMES U. RUPPERT,
Appellee and Cross-Appellant.

No. 77-1022

APPEAL AND CROSS-APPEAL FROM THE COURT OF APPEALS FOR BUTLER COUNTY

(Received May 19, 1978)

This cause, here on appeal and cross-appeal from the Court of Appeals for Butler County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein, and it ap-

pearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Butler County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... Clerk

..... Deputy

APPENDIX E

Ohio Revised Code Ann. § 2929.03 (Page 1975)
Ohio Revised Code Ann. § 2945.06 (Page 1975)

§ 2929.03 Imposing sentence for a capital offense.

(A) If the indictment or count in the indictment charging aggravated murder contains no specification of an aggravating circumstance listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge, the trial court shall impose sentence of life imprisonment on the offender.

(B) If the indictment or count in the indictment charging aggravated murder contains one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, the verdict shall separately state whether the accused is found guilty or not guilty of the principal charge and, if guilty of the principal charge, whether the offender is guilty or not guilty of each specification. The jury shall be instructed on its duties in this regard, which shall include an instruction that a specification must be proved beyond a reasonable doubt in order to support a guilty verdict on such specification, but such instruction shall not mention the penalty which may be the consequence of a guilty or not guilty verdict on any charge or specification.

(C) If the indictment or count in the indictment charging aggravated murder contains one or more specifications listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge but not guilty of each of the specifications, the trial court shall impose sentence of life imprisonment on the

offender. If the indictment contains one or more specifications listed in division (A) of such section, then, following a verdict of guilty of both the charge and one or more of the specifications, the penalty to be imposed on the offender shall be determined:

(1) By the panel of three judges which tried the offender upon his waiver of the right to trial by jury:

(2) By the trial judge, if the offender was tried by jury.

(D) When death may be imposed as a penalty for aggravated murder, the court shall require a pre-sentence investigation and a psychiatric examination to be made, and reports submitted to the court, pursuant to section 2947.06 of the Revised Code. Copies of the reports shall be furnished to the prosecutor and to the offender or his counsel. The court shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender. If the offender chooses to make a statement, he is subject to cross-examination only if he consents to make such statement under oath or affirmation.

(E) Upon consideration of the reports, testimony, other evidence, statement of the offender, and arguments of counsel submitted to the court pursuant to division (D) of this section, if the court finds, or if the panel of three judges unanimously finds that none of the mitigating circumstances listed in division (B) of section 2929.04 of the Revised Code is established by a preponderance of the evidence, it shall impose sentence of death on the offender. Otherwise, it shall impose sentence of life imprisonment on the offender.

HISTORY: 134 v H 511. Eff 1-1-74.

Committee Comment

This section specifies the procedure to be followed in determining whether the sentence for aggravated murder is to be life imprisonment or death.

The death penalty is precluded unless the indictment contains a specification of one or more of the aggravating circumstances listed in section 2929.04. In the absence of such specifications, life imprisonment must be imposed. If the indictment specifies an aggravating circumstance, it must be proved beyond a reasonable doubt, and the jury must return separate verdicts on the charge and specification. If the verdict is guilty of the charge but not guilty of the specification, the penalty is life imprisonment.

If the verdict is guilty of both the charge and the specification, the jury is discharged and the trial begins a second phase designed to determine the presence or absence of one or more mitigating circumstances. If one of the three mitigating factors listed in section 2929.04 is established by a preponderance of the evidence, the penalty is life imprisonment. If none of such factors is established, the penalty is death. The procedure is essentially the same in the first phase of an aggravated murder trial whether the case is tried by a jury or by a three-judge panel on a waiver of a jury. The burden of proof still rests on the state, the same rules of evidence apply, the specification must be proved beyond a reasonable doubt, and the panel's verdict must be unanimous.

With respect to the mitigation phase of the trial, the procedure is somewhat different depending on whether the case is tried by a jury or a three-judge panel. A jury tries only the charge and specification, and the judge in a jury trial determines mitigation. If a jury is waived, the same three-judge panel tries not only the charge and specification, but also determines the presence or absence of mitigation. Also, the statute expressly provides that the panel's finding that no mitigating circumstance is established must be unanimous, or the death penalty is precluded. In other respects, the procedure for determining mitigation is similar whether the trial judge or a three-judge panel tries the issue. Mitigation must be established by a preponderance of the evidence, and the rules of evidence also apply in this phase of the trial (the requirement for a pre-sentence investigation and report, the requirement for a psychiatric examination and report, and the provision for an unsworn statement by the defendant, represent partial exceptions to the rules of evidence).

§ 2945.06 Jurisdiction of judge when jury trial is waived; three-judge court. (GC § 13442-5)

In any case in which a defendant waives his right to trial by jury and elects to be tried by the court under section 2945.05 of the Revised Code, any judge of the court in which such cause is pending shall proceed to hear, try, and determine such cause in accordance with the rules and in like manner as if such cause were being tried before a jury. If the accused is charged with an offense punishable with death, he shall be tried by a court to be composed of three judges, consisting of the judge presiding at the time in the trial of criminal cases and two other judges to be designated by the presiding judge or chief justice of said court, and in case there is neither presiding judge nor chief justice, by the chief justice of the supreme court. Such judges or a majority of them may decide all questions of fact and law arising upon the trial, and render judgment accordingly. If the accused pleads guilty of murder in the first degree, a court composed of three judges shall examine the witnesses, determine the degree of crime, and pro-

nounce sentence accordingly. In rendering judgment of conviction of an offense punishable by death upon plea of guilty, or after trial by the court without the intervention of a jury, the court may extend mercy and reduce the punishment for such offense to life imprisonment in like manner as upon recommendation of mercy by a jury. If in the composition of said court it is necessary that a judge from another county be assigned by the chief justice, such judge shall be compensated for his services as provided by section 141.07 of the Revised Code.

HISTORY: GC § 13442-5; 113 v 123 (179), ch.21, § 5; 115 v 531, § 1. Eff 10-1-53.

Comment: See related Crim. R. 23(C). Note that the procedure in murder cases is now determined by RC §§ 2929.03, 2929.04.

APPENDIX F

Affidavits Submitted on Motion for New Trial

1) **Fred B. Cramer, July 18, 1975**
2) **Fred B. Cramer, July 22, 1975**
3) **James U. Ruppert**
4) **Hugh D. Holbrock**
5) **H. J. Bressler**
6) **John F. Holcomb**

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CR75-04-0244

THE STATE OF OHIO,

Plaintiff,

vs.

JAMES U. RUPPERT,

Defendant.

AFFIDAVIT

STATE OF OHIO, BUTLER COUNTY, S.S.:

Fred B. Cramer, being first duly cautioned and sworn, states the following:

Some few days prior to June 6, 1975, Mr. H. J. Bressler, one of counsel for the defendant in my chambers, informed me that his client was going to waive a trial by jury and ask to be tried by a panel of three judges.

The decision, Mr. Bressler stated, was arrived at after he and Mr. Holbrock had given the defendant their opinions that, before defendant could be found guilty, not guilty or not guilty by reason of insanity, all three judges would have to agree. Mr. Bressler further stated that counsel had examined the law before reaching the opinions they arrived at and before informing the defendant as to the opinions they had so formed Mr. Bressler asked me as to what I believed to be the law in that respect. We both examined the statutes covering the situation so presented and I informed him that I was in agreement with the opinion he told me they had rendered to their client.

Thereafter, on June 6, 1975 the defendant was brought into the courtroom acocmpanied by his counsel and a member of the Prosecuting Attorney's staff was also present. In the courtroom, at counsel table, the defendant after consulting with his counsel, signed in the presence of all of us an instrument designated "Jury Waiver."

After signing the same, the defendant was called to the bench with his counsel, a colloquy took place between the Court and the defendant which was taped. The attached instrument marked Exhibit "A" contains a transcription by the Court Reporter made from such taped recording and is herewith made a part hereof.

Thereafter on June 16, 1975, I together with the two other judges making up the three-judge panel were in my chambers preparing to enter the courtroom to commence the trial. While we were still in my chambers counsel for the defendant and the State came into chambers, one of counsel for the defendant made an inquiry of us as to whether we had determined as to whether the law required the decision respecting guilt, innocence or not guilty by reason of insanity had to be arrived at unanimously. Counsel was then informed that such decision would be made at the time consideration was being given to the cause after its completion and the Court was going into deliberation.

Immediately thereafter the court was opened and three members of the panel assembled on the bench. Immediately the defendant was called to appear before the bench and did so in the company of his counsel. I, as presiding judge, addressed the defendant and received the responses made by him all of which was both tape-recorded and taken by the Court Reporter in shorthand notes. A transcription was made by said Court Reporter both from the

recording and her shorthand notes which appear in an instrument attached hereto and marked "B".

Immediately thereafter trial of the cause commenced before the three-judge panel.

/s/ FRED B. CRAMER

Sworn to before me this 18th day of July, 1975

/s/ MARGARET SPOERL
Notary Public, State of Ohio

"A"

AND THEREUPON on June 6, 1975, in open court the defendant, James U. Ruppert, in the presence of his counsel and counsel for the prosecution and immediately before the commencement of the trial was interrogated by the presiding judge and made responses as follow:

Q. Ruppert, I have before me an instrument entitled "Jury Waiver" and bearing your name, James, what is it — "V" Ruppert? You signed that here in open court?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

Q. And I'm going to read it to you and again ask what it already contains therein.

Q. And see if you adhere to the contents of the jury waiver which you say you signed. First of all, you did so after consulting with and getting the advice of your attorneys whom you privately employed since the date of your arrest, is that right?

A. Yes, sir.

Q. And everything that is recited in this jury waiver which I am about to read to you is correct, is that true?

A. Yes, sir.

Q. Alright. It reads as follows after giving the title of the case:

> "I, James U. Ruppert, defendant in the above-captioned cause appearing the 6th day of June, 1975, in open court accompanied by my counsel, Mr. Hugh Holbrock and Mr. H. J. Bressler, whose advice and counsel I have received from the date of my arrest during frequent interviews with them and being fully advised by them, that I am entitled under the Constitution of the United States and of Ohio and the laws of the State of Ohio to a trial by jury on each of the 11 counts contained in the indictment against me charging me with aggravated murder do hereby waive my right to trial by jury on each of said counts and consent to be tried thereon by a panel of 3 judges of the Common Pleas Court of Butler County, Ohio as provided by law.
>
> I am waiving said trial by jury voluntarily, knowingly and intelligently and so consenting to be tried by a panel of three judges. Said waiver by me is made and executed without compulsion, undue influence exerted upon me and without any promises or inducements of any kind made to me by anyone. Specifically, I consent to said panel of judges being made up by Judges Fred B. Cramer, Arthur J. Fiehrer and Robert L. Marrs and consent that in the event any one or more of said judges is unable to serve on said panel that any judge of a Common Pleas Court, duly designated in accordance with law, may replace said judge or judges on said panel."

Do you understand what I've read?

A. Yes, sir.

Q. And you understood when you signed it?

A. Yes, sir.

Q. And you wish to adhere to this waiver of trial by jury?

A. Yes, sir.

Q. Now, you understand that when you are tried by a jury which you are waiving, before you can be found guilty or not guilty of any one or all of the 11 counts, all 12 of the jurors must agree?

A. Yes, sir.

Q. But where three judges hear the case as you have consented and asked to be done, just all three have to agree?

A. Yes, sir.

Q. You understand that?

A. Yes, sir.

Q. You also understand, do you, that if you have a jury that before they can find in accordance with your defense that you were sane or insane at the time of the alleged commission of said offenses, all 12 of the jurors must agree. However, if three judges hear your case as you have requested to be done before the three judges can find that you were sane or insane at the time of the alleged commission of the offenses, all three must agree on that?

A. Yes, sir.

Q. I'm pointing this out to you, the difference between when the jury hears a case and three judges.

A. Yes, sir.

Q. And you wish to without any question, to waive your trial by jury, is that right?

A. Yes, sir.

Q. Is there anything you want to ask the Court in reference to this? Anything you don't understand about the jury waiver?

A. No, sir.

Q. All this has been fully explained to you by your attorneys and now by the Court?

A. Yes, sir.

Q. And you understand what is being said to you?

A. Yes, sir.

Q. By me and what has been said to you by them in that respect, is that correct?

A. Yes, sir.

Q. And you are voluntarily and knowingly and intelligently consenting to waive a jury and you know what we mean by "waive", of course, give up?

A. Yes.

Q. And to be tried by a panel of three judges, is that right?

A. Yes, sir.

Q. Nobody compelled you to do this?

A. No, sir.

Q. No promises were made to you by anyone?

A. No, sir.

Q. And you have — no one has used any influence on you, undue or otherwise, to get you to waive a jury?

A. No, sir.

Q. And you want the Court (me) to approve this waiver which you have signed?

A. Yes, sir.

By the Court: Alright. We'll so consent.

"B"

Monday morning, June 16, 1975 at 9:10:

AND THEREUPON the Court (Presiding Judge Fred B. Cramer) interrogated the defendant as follows:

Q. Alright, Mr. Ruppert, last week you appeared here in court with counsel and waived in writing your right to trial by jury and it was accepted at that time. We want to now make an inquiry of you if you are standing by and reaffrming that written waiver of trial by a jury and submit to be tried by the panel of three judges who are seated here?

A. Yes, sir.

Q. You do not wish to withdraw your waiver of trial by jury?

A. No, sir.

Q. And you reaffirm the fact, do you, that such waiver was executed in accordance with what we stated at the time you did execute it that you were doing it voluntarily and knowingly and fully understanding all of your rights that you have under the Constitution of the United States and Ohio and the law of this state respecting your right to trial by jury having been fully explained to you by the Court as well as your counsel? Is that correct?

A. Yes, sir.

Q. And you are standing by that waiver and wish not to withdraw it at this time which you are permitted to do if you wish to and the jury will try this case?

A. No, I want it to be as it is.

Q. And it is and you want to stand by your waiver of trial by jury?

A. Yes, sir.

Alright.

CERTIFICATE

I, Margaret Spoerl, Court Reporter for the Butler County Common Pleas Court, and designated to transcribe the aforementioned interrogation of the defendant as to his jury waiver, which was taken without my attendance on the Sony recorder, do hereby certify that the foregoing 4 pages constitute a true and complete transcript of proceedings had during said hearing.

/s/ MARGARET SPOERL
Court Reporter

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CR75-04-0244

THE STATE OF OHIO

Plaintiff,

vs.

JAMES U. RUPPERT

Defendant.

AFFIDAVIT

(Filed July 22, 1975)

STATE OF OHIO, BUTLER COUNTY, S.S.:

Fred B. Cramer, being first duly cautioned and sworn, states the following:

By way of clarification of the first two paragraphs of my Affidavit of July 18, 1975 in the within cause, at no time did I ever discuss my opinion as to a possible unanimity of verdict with counsel for defendant except until after counsel firmly advised me that defendant was definitely waiving a trial by jury and was consenting to be tried by a three judge panel. The Prosecuting Attorney was not notified and was not present.

By way of clarification of the fifth paragraph of my Affidavit of July 18, 1975 in the within cause, on June 16, 1975 during the conference between all counsel and the three judge panel in chambers immediately prior to the commencement of the trial herein, there was a special venire of prospective jurors for this case standing by in an adjoining room to be used in the event defendant withdrew his jury waiver and all counsel knew of this fact.

/s/ FRED B. CRAMER

Sworn to before me this 22nd day of July, 1975.

/s/ JOYCE A. ROBERTS
Notary Public, State of Ohio

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CR75-04-0244

STATE OF OHIO

Plaintiff,

vs.

JAMES U. RUPPERT

Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR A NEW TRIAL

STATE OF OHIO,
COUNTY OF BUTLER, SS:

JAMES U. RUPPERT, being duly sworn, states:

He is the defendant in the above-captioned case and that prior to his signing a form in which he allegedly waived his right to a jury trial he was informed by his attorneys, Hugh D. Holbrock and H. J. Bressler, that if he waived his right to trial by jury, he would then be tried by a panel of three (3) judges, and that any verdict which they might reach would have to be based on a unanimous decision by those on the panel. Affiant further states that his belief that any verdict rendered by the three judge panel must be unanimous was further reinforced and established in open court wherein the presiding judge, while addressing the defendant from the bench, stated that any decision reached by the three judge

panel must be a unanimous decision among the three judges.

Further, Affiant sayeth naught.

WITNESSETH:

JAMES U. RUPPERT

Sworn to before me and subscribed in my presence this ——— day of July, 1975.

Notary Public

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CR75-04-0244

STATE OF OHIO

Plaintiff,

vs.

JAMES U. RUPPERT

Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR A NEW TRIAL

STATE OF OHIO,
COUNTY OF BUTLER, SS:

Now comes Hugh D. Holbrock, being duly sworn, and states that he is one of the attorneys for the defendant in the above-entitled case and that, at some point prior to the date on which the defendant, James U. Ruppert, signed the alleged jury waiver, the Presiding Judge in this case informed said affiant that, in his opinion, any verdict reached by the three-judge panel, in the event that the defendant waived his right to a jury trial, must be a unanimous decision.

Affiant further states that, following the above-mentioned discussion and prior to the time which James U. Ruppert signed the alleged jury waiver, this affiant informed the defendant that if the case were tried to a three-judge panel, that the final verdict must be unanimous.

Further, affiant sayeth not.

WITNESSETH:

_____

_____

_____

HUGH D. HOLBROCK

Sworn to before me and subscribed in my presence this _____ day of July, 1975.

_____

Notary Public

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CR75-04-0244

STATE OF OHIO

Plaintiff,

vs.

JAMES U. RUPPERT

Defendant.

AFFIDAVIT IN SUPPORT OF MOTION FOR A NEW TRIAL

STATE OF OHIO,
COUNTY OF BUTLER, SS:

Now comes H. J. Bressler, being duly sworn, and states that he is one of the attorneys for the defendant in the above-entitled case and that, at some point prior to the date on which the defendant, James U. Ruppert, signed the alleged jury waiver, the Presiding Judge in this case informed said affiant that, in his opinion, any verdict reached by the three-judge panel, in the event that the defendant waived his right to a jury trial, must be a unanimous decision.

Affiant further states that, following the above-mentioned discussion and prior to the time which James U. Ruppert signed the alleged jury waiver, this affiant informed the defendant that, in his opinion, if the case were tried to a three-judge panel, that the final verdict must be unanimous.

Further, affiant sayeth not.

WITNESSETH:

_____

_____

_____

H. J. BRESSLER

Sworn to before me and subscribed in my presence this ——— day of July, 1975.

_____

Notary Public

_____

COURT OF COMMON PLEAS
BUTLER COUNTY, OHIO

No. CR75-04-0244

THE STATE OF OHIO

Plaintiff,

vs.

JAMES U. RUPPERT

Defendant.

AFFIDAVIT

(Filed July 22, 1975)

John F. Holcomb, being first duly cautioned and sworn, deposes and says:

1. The Prosecuting Attorney was never notified of and was not present at the meeting between counsel for the defendant and the Presiding Judge to which they allude in their affidavits filed herein.

None of the other judges was ever notified of or was present at the said meeting between counsel for the defendant and the Presiding Judge, to the best of the knowledge and belief of the Prosecuting Attorney.

2. On June 16, 1975 immediately prior to the commencement of the trial herein there was a conference in chambers between all counsel and all judges. At this conference Mr. Hugh Holbrock asked the judges whether or not they had resolved the question of whether the verdict had to be unanimous or by a majority of the court. It is my very distinct recollection that Judge Marrs in the presence of all told Mr. Holbrock: "We will cross that bridge when we get to it," and that was all that was said about it by anyone.

Everyone present was aware that there was a question as to whether the verdict had to be unanimous or by a majority of the court and that this question was unresolved at that point.

Further affiant saith not.

JOHN F. HOLCOMB
Prosecuting Attorney
Butler County, Ohio

Sworn to before me and subscribed in my presence this 21st day of July, 1975.

MICHAEL T. GMOSER
Notary Public, Butler County
State of Ohio
My commission expires September 2, 1975

Supreme Court, U. S.
FILED
SEP 14 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-254

STATE OF OHIO,

Petitioner,

vs.

JAMES U. RUPPERT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

H. J. BRESSLER
HUGH D. HOLBROCK
TIMOTHY R. EVANS
315 So. Monument
Hamilton, Ohio 45011
(513) 868-7600

Attorneys for Respondent

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

INDEX

Page

STATEMENT OF THE CASE 1

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED 3

CONCLUSION 10

AUTHORITIES

Adams v. *U.S. ex rel. McCann,* 317 US 269 (1943) .. 4, 5

Baez v. *Circuit Court of Cook County,* 395 FSupp 1285 8

Boykin v. *Alabama,* 395 US 238 7

Brady v. *United States,* 397 US 742 5

California v. *Ames,* 52 Cal. App. (3d) 8

California v. *Elliott,* 6 Cal Rep 753 8

Ford v. *Indiana,* 299 NW (2d) 637 8

Henderson v. *Morgan,* 426 US 637 7

Johnson v. *Zerbst,* 304 US 458 4

McMann v. *Richardson,* 397 US 759 ..... 5, 6

McCarthy v. *United States,* 394 US 459 7

Missouri v. *Sharp,* 533 SW (2d) 601 8

Parker v. *North Carolina,* 397 US 790 ..... 5, 6

Pennsylvania v. *Hookes,* 301 A (2d) 827 8

Pennsylvania v. *Stokes,* 299 A (2d) 272 8

Page

Pennsylvania v. *Williams,* 213 A (2d) 597 8

State v. *McCoy,* 26 OApp (2d) 62 8

State ex rel. Ringer v. *Boles,* 157 SE 554 8

Tollet v. *Henderson,* 411 US 258 ..... 6, 7

United States v. *Jackson,* 390 US 570 5

Vermont v. *Bliss,* 340 A (2d) 76 8

Williams v. *Indiana,* 307 NE (2d) 880 8

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-254

STATE OF OHIO,

Petitioner,

vs.

JAMES U. RUPPERT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

STATEMENT OF THE CASE

The Respondent agrees substantially with the Statement of the Case except that the Respondent would add the following:

That at the June 6, 1975 hearing referred to by Petitioner's Brief and relevant portions which appear in the end of Petitioner's Brief, it should be noted that the Prosecuting Attorney was present in open Court at the time Judge Cramer advised the Respondent of his rights to a jury trial and at no time did the Prosecuting Attorney make any objection thereto.

It should also be noted that at the June 16, 1975 pretrial conference the Prosecuting Attorney was present in

chambers when the inquiry was made about the unamnimity and again at that time the Prosecutor raised no objection nor made any comment.

It should further be noted that Respondent James U. Ruppert had no knowledge of what had gone on at either the informal conference before the June 6, 1975 waiver of a jury, or the pre-trial conference before commencement of trial on June 16, 1975.

In addition it must be noted that at any time before time of trial the Respondent could have negated his jury waiver.

It should also be noted that the opinion of the First District Court of Appeals found that Fundamental Fairness had been violated in informing Ruppert of the need for unanimity, then convicting him by a simple majority of a three judge panel and finally the Ohio Supreme Court relied on Ohio Criminal Rule 23 in reaching its decision that the jury waiver was not knowing, intelligent and voluntary. (See Appendix A for Ohio Criminal Rule 23).

REASONS WHY CERTIORARI SHOULD NOT BE GRANTED

I.

This Court need not determine the validity of the decision by The Court of Appeals First District of Ohio and by The Supreme Court of Ohio for the reason that said considerations were grounded not only on the Constitutional principles but on established Ohio Law and upon the Criminal Rules.

The Petitioner argues that the Court of Appeals and the Supreme Court applies a "per se rule" to invalidate the jury waiver and insists that the two Ohio Courts held under such a "per se rule" that whenever misinformation is given a client by an attorney this will invalidate either the verdict or the jury waiver.

However, neither Court used such a "per se" test to determine whether the jury waiver by the defendant was knowingly, intelligently and voluntarily made, but instead looked in detail at the facts and circumstances surrounding the waiver and found that the defendant could not have given up a known right based on what he was told. As the Court of Appeals stated, which is found in the Appendix of the Petitioner's Brief, the jury waiver was not made knowingly and intelligently and that Respondent only consented to a trial before a panel which had to be unanimous in all guilt findings, but what he actually got was a trial where the majority of the two could find him guilty and was not made aware of that until after the determination of guilt.

The Court concluded that the waiver was not knowing and therefore could not be voluntary and was governed by established principals of fairness.

In addition the Ohio Supreme Court based its holding on Ohio Criminal Rule 23 which is found in Appendix to Respondent's Brief. This Rule basically requires that before commencement of a trial the defendant may knowingly, intelligently and voluntarily waive in writing his right to a jury trial, but such waiver must be knowingly, intelligent and voluntary. It might be noted in addition that in this case both courts found that the waiver was not knowingly, intelligently and voluntarily made on the facts of this case and not on any "per se test".

James Ruppert testified in the Motion for a New Trial that he did not make the decision to waive the jury until the day that he signed the paper and that he was advised by the Court that all three must be unanimous. (See opinion of the First District Court of Appeals). In addition it should again be stressed that at the initial waiver on June 6, 1975 and at the pre-trial conference which took place on June 16, 1975 the Prosecuting Attorney was present.

Thus it is obvious from the circumstances that there was adequate basis for the decision of both the Court of Appeals and the Ohio Supreme Court. In fact both Courts said that the jury waiver was not knowingly, intelligently and voluntarily made because Mr. Ruppert had clearly been given a set of circumstances on which he relied and which later turned out to be false. All cases cited by the Petitioner note that it must be an intelligent choice, i.e., an intentional relinquishment or abandonment of a right or privilege, e.g., *Johnson* v. *Zerbst,* 304 U.S. 458. How could Respondent intentionally have abandon a known right when he was misinformed as to the extent of that right?

Petitioner cites the case of *Adams* v. *U.S. Ex Rel McCann,* 317 U.S. 269 (1943) yet *Adams* is distinguishable

since it is obvious that *Adams* does not deal with the situation in which faulty information is given and in fact *Adams* makes it clear that the waiver must be freely and intelligently made which of course implies that the information given must be correct and that whether or not there is an intelligent, competent waiver of a jury trial depends on the unique circumstances of each case.

Therefore, neither Court formulated a "per se rule" but merely looked at the circumstances of this case and found that the jury waiver was not knowingly, intelligently and voluntarily made.

The Respondent next alludes to an alleged triology of cases in 1970 which he contends were developed to meet the modern reality of universal assistance of counsel. However, all three of these cases, i.e., *Brady* v. *United States,* 397 U.S. 742, *McMann* v. *Richardson,* 397 U.S. 759 and *Parker* v. *North Carolina,* 397 U.S. 790 are distinguishable from the case at hand. In *Brady,* counsel's mistake was thinking the State had a stronger case than it did and in advising the Petitioner to plead in exchange for the State guaranteeing that the death penalty would not be imposed. It should be noted that the Petitioner pled guilty in *Brady* in 1959 and the Death Penalty Statute was not declared unconstitutional until nine years later. At the time of the plea the death penalty was a very real possibility and had it been imposed it is quite likely that the Petitioner would have been dead by the time this Court decided *United States* v. *Jackson,* 390 U.S. 570.

Furthermore, in a guilty plea in *Brady* Petitioner admitted the facts and admitted that he was guilty in exchange for leniency. James Ruppert, however, pled not guilty and waived his right right to a jury trial only on the assurance that the three judge panel must be unanimous.

In *McMann* v. *Richardson,* Supra, the Supreme Court decided that if a coerced confession had an abiding impact and tainted the plea then the plea would be overturned. However, on the specific facts of this case this Court found no such abiding impact and noted that a conviction after a plea of guilty rests on the defendant's own admission in open court that he committed the acts with which he is charged and without such admission there could be no guilty plea.

Once again this is an entirely different situation than that of James Ruppert for the simple reason that the court in *McMann* v. *Richardson,* found that the guilty plea was made voluntarily and found that a coerced confession which was made did not so taint the admission of the defendant who pled guilty that it would require setting the plea aside.

Finally in *Parker, Supra,* the Court found the circumstances dissipated the taint of the coerced confession and that nothing in the record raised any doubts that the defendant's admission of guilt was based on anything other than his actual guilt.

The Petitioner then cites *Tollet* v. *Henderson,* 411 U.S. 258 in which this Court stated that erroneous advice which was peripheral to the normal focus of counsel's inquiry would not invalidate a waiver of trial and a guilty plea otherwise made intelligently and voluntarily. In *Tollet,* supra the defendant sought to overturn the plea on the grounds that the Grand Jury had excluded negroes. The issue was not raised in the State Court at all at the time of the plea and furthermore at the time of the plea of guilty it was apparent that he and his attorney were unaware that negroes had been excluded. The Court said that there was no showing (1) that this had any effect on the validity of the indictment; (2) since it was unknown by the defendant and his attorney it certainly could have had no effect on the decision whether or not to plead guilty.

It must be noted that this Court stated in *Tollet* v. *Henderson* that the erroneous advise must be peripheral to the normal focus of counsel's inquiry. The normal focus of counsel's inquiry may not necessarily include the makeup of the Grand Jury and this Court found that in this case such inquiry was peripheral. However, the decision of whether or not to waive a jury is certainly not peripheral to the normal focus of counsel's inquiry and thus *Tollet* v. *Henderson* is not applicable. This Court did hold in the case of *Henderson* v. *Morgan,* 426 U.S. 637:

> ". . . An assumption that a defendant in a criminal case would have upon the advise of his attorney pled guilty to a charge of second degree murder even if he had been informed that intent to cause his victims death was an element of the offense is an insufficient predicate for conviction on that charge . . ."

This Court further stated:

> ". . . Where the defendant was not advised of this important element he could not plead guilty . . ."

Both the Court of Appeals and The Ohio Supreme Court relied on this case finding that after consideration of all the facts the jury waiver could not have been made knowingly, intelligently and voluntarily particularly relying on *McCarthy* v. *United States,* 394 U.S. 459 and *Boykin* v. *Alabama,* 395 U.S. 238. Various State Courts and Federal Courts have likewise decided the issue of a valid jury waiver. The cases cited above in this Court merely rest upon a plea of guilty which is a different circumstance all together. In a plea of guilty the defendant admits his guilt and admits the facts. However, in waiving a jury he merely waives an important constitutional right, but does not admit his guilt and the distinction is one of importance.

In the case of *State* v. *McCoy,* 26 OApp (2d) 62 the Court of Appeals of Ohio held:

> ". . . Where the defendant did not waive a trial by jury as provided by statute the trial court had no authority to hear and determine the issues even if the facts were stipulated . . ."

In this case the defendant had not waived a trial by jury in writing. The Court found that this fact in and of itself was sufficient error and reversed the case.

Other states are in accord to the fact that a jury waiver must be knowing, intelligent and voluntary, see for example *Baez* v. *Circuit Court of Cook County,* 395 FSupp 1285, *Pennsylvania* v. *Stokes,* 299 A (2d) 272, *Pennsylvania* v. *Hookes,* 301 A (2d) 827, *Pennsylvania* v. *Williams,* 213 A (2d) 597, *Ford* v. *Indiana,* 299 NW (2d) 637, *Williams* v. *Indiana,* 307 NE (2d) 880, *Missouri* v. *Sharp,* 533 SW (2d) 601, *Vermont* v. *Bliss,* 340 A (2d) 76, *State ex rel Ringer* v. *Boles,* 157 SE 554, *California* v. *Elliott,* 6 Cal Rep. 753 and *California* v. *Ames,* 52 Cal. App. (3d) 389. These State Court cases all illustrate that where misinformation is given and where such information importantly affects defendant's decision to waive a jury, such a jury waiver is invalid since it does affect the knowing, intelligent and voluntary waiver of a jury.

Petitioner concludes by stating that the Courts below had departed drastically from the principals announced by this Court by holding in effect the legal advice given by counsel in the Court at the time of the jury waiver must be absolutely accurate. This was not the holding. The holding was merely that the advice given at this time was erroneous, that it did affect the jury waiver under the circumstances of this case so as to make it not a knowing,

intelligent and voluntary waive and for this reason they granted Respondent a new trial.

II.

Neither the Court of Appeals nor the Supreme Court of Ohio found any invited error nor did they find that the judge's statement of law arose the suggestion of the defense counsel.

Petitioner argues that the Courts failed to consider the fact that the advice was a reasonably competent interpretation of the law at the time of the waiver. However, both Courts did consider this, noted it and still said that that fact did not make a difference in whether or not there was an intelligent and voluntary jury waiver.

Petitioner states that the error was invited, however it is also without dispute as it appears on the record the Prosecuting Attorney was present in an open court when the advice was given the defendant on his jury waiver and the prosecuting attorney made no statement and did not object. Again at the pre-trial conference on June 16, 1975 the Prosecuting Attorney was again present and never raised the issue and made no objection nor sought any clarification. This was no invited error and neither court found that it was invited error.

Indeed it is clear that what was sought was merely an interpretation of the law before the presiding judge before the defendant waived his right to a jury. Under Ohio Criminal Rule 23 the defendant is entitled to know the exact nature of the right he is waiving which in this case Judge Cramer did.

Therefore, the decision of the First District Court of Appeals and the Supreme Court of Ohio finding the jury waiver not to be knowing, intelligent and voluntary was correct.

CONCLUSION

For the reasons stated above it is respectfully requested that the Writ of Certiorari be denied to review the judgment of the Supreme Court of Ohio.

H. J. BRESSLER
HUGH D. HOLBROCK
TIMOTHY R. EVANS
315 So. Monument
Hamilton, Ohio 45011
(513) 868-7600

see

78

483